Supreme Court, U.S.
FILED

01 372 AUG 29 2001

OFFICE OF THE CLERK

No. —

IN THE

Supreme Court of the United States

JAMES T. HANNON AND RONALD J. TOWNSEND,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. KATOR*
BRITA DAGMAR STRANDBERG
KATOR, PARKS & WEISER
1020 19th Street, N.W.
Suite 350
Washington, D.C. 20036-6101
(202) 898-4800

* Counsel of Record

August 29, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

95 pp

QUESTION PRESENTED

Whether the Federal Circuit erred in its construction of the term "law enforcement officer" as it appears in the civil service retirement statutes when, rather than apply the explicit and unambiguous definition Congress provided, it imposed requirements not contained in the statute, included a requirement specifically repealed by Congress, and ignored the implementing agency's regulations defining the term?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	16
APPENDICES	
Appendix A	1a
Appendix B	15a
Appendix C	16a
Appendix D	17a
Appendix E	18a
Appendix F	34a
Appendix G	42a

TABLE OF AUTHORITIES

CASES	Page
American Nat'l Red Cross v. S.G., 505 U.S. 247 (1992)	11
Bingaman v. Department of the Treasury, 127 F.3d 1431 (Fed. Cir. 1997)	6, 8, 9
Bremby v. Department of the Navy, 81 M.S.P.R. 450 (1999)	9
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	12
Colautti v. Franklin, 439 U.S. 379 (1979)	10
Hughes Aircraft Co. v. Jacobson, 525 U.S. 432 (1999)	10
Obremski v. Office of Personnel Management, 699 F.2d 1263 (D.C. Cir. 1983)	9, 11
Pierce v. Underwood, 487 U.S. 552 (1988)	12
Regions Hosp. v. Shalala, 522 U.S. 448 (1998)	13
United States v. Mead Corp., 121 S. Ct. 2164 (2001)	12
United States v. Moore, 423 U.S. 122 (1975)	5
Watson v. Department of the Navy, No. 00-3387, 2001 U.S. App. LEXIS 18574 (Fed. Cir. Aug. 17, 2001)	*passim*
Watson v. Department of the Navy, 86 M.S.P.R. 318 (2000)	9

STATUTES	
5 U.S.C. § 3307	15
5 U.S.C. § 5545a(a)(2)	11
5 U.S.C. § 8331(20)	*passim*
5 U.S.C. § 8335	15
5 U.S.C. § 8336(c)	2
5 U.S.C. § 8347(a)	13
5 U.S.C. § 8401(17)	*passim*
5 U.S.C. § 8412(d)	2
5 U.S.C. § 8425	15

TABLE OF AUTHORITIES—Continued

	Page
5 U.S.C. § 8461(g)	13
28 U.S.C. § 1254(1)	2
62 Stat. 1221 (1948)	3
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (1970)	4
Pub. L. No. 80-168, 61 Stat. 307 (1947)	3
Pub. L. No. 93-350, 88 Stat. 355 (1974)	11
REGULATIONS	
5 C.F.R. § 831.902	13, 14
5 C.F.R. § 831.903	15
5 C.F.R. § 831.906	14, 15
5 C.F.R. § 831.907	15
5 C.F.R. § 842.802	13, 14
5 C.F.R. § 842.803	15
OTHER AUTHORITIES	
Evaluation of the Diversion Control Program, U.S. Department of Justice Drug Enforcement Administration Planning and Inspection Division (May 1, 1983)	4
In the Matter of Karen Ann Quinlin (Warren V. Bush Productions 1977)	5
Karen's Precedent, TIME MAGAZINE, Apr. 12, 1976, at 50	5
Playing with Pain Killers, NEWSWEEK, Apr. 9, 2001, at 44	5
S. Rep. No. 96-166 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405	12
Fox Butterfield, *Theft of Painkiller Reflects its Popularity on the Street*, N.Y.TIMES, July 7, 2001, at A6	5
Gilbert Cant, *Valiumania*, N.Y. TIMES MAGAZINE, Feb. 1, 1976, at 34	5

IN THE

Supreme Court of the United States

No. 01—

JAMES T. HANNON AND RONALD J. TOWNSEND,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

James T. Hannon and Ronald J. Townsend hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

In *Hannon v. Department of Justice*, the court of appeals's decision affirming the Merit Systems Protection Board was entered on December 7, 2000 and is reported at 234 F.3d 674. The petition for rehearing and rehearing *en banc* was denied on May 1, 2001. The court of appeals's decision is appended hereto as Appendix A, and its denial of the petition for rehearing and rehearing *en banc* is appended hereto as Appendix B.

In *Townsend v. Department of Justice*, the court of appeals's unreported decision affirming the Merit Systems

Protection Board was entered on January 11, 2001. The petition for rehearing and rehearing *en banc* was denied on May 1, 2001. The court of appeals's decision is appended hereto as Appendix C, and its denial of the petition for rehearing and rehearing *en banc* is appended hereto as Appendix D.

These cases arose in the Federal Circuit on petition for review of a final decision of the Merit Systems Protection Board. The Board's decision in *Hannon* is reported at 83 M.S.P.R. 427 (1999) and in *Townsend* at 83 M.S.P.R. 315 (1999). These decisions are reproduced at Appendix E and Appendix F, respectively. Both cases were consolidated for hearing before an Administrative Judge of the MSPB. His decision is unreported but attached as Appendix G.

JURISDICTION

This case arises on petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit. The court below affirmed the Merit Systems Protection Board's decisions sustaining the Department of Justice's determinations that petitioners were not law enforcement officers and therefore were not entitled to enhanced retirement benefits under 5 U.S.C. §§ 8336(c) and 8412(d). On July 20, 2001, Chief Justice Rehnquist granted petitioners' application to extend the time within which they could file their petition to August 29, 2001. This petition is, accordingly, filed within the time allowed by law. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code, Section 8331(20) provides:

> "[L]aw enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the

United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

Title 5, United States Code, Section 8401(17) provides:

[T]he term "law enforcement officer" means—

(A) an employee, the duties of whose position—

(i) are primarily—

(I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or

(II) the protection of officials of the United States against threats to personal safety; and

(ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

STATEMENT

Since 1947, Congress has provided special retirement benefits for federal law enforcement officers.[1] While at first these benefits were limited to Special Agents of the Federal Bureau of Investigation, in 1948 Congress broadened this coverage to apply to essentially all civilian government employees "the duties of whose positions are primarily the investigation, apprehension, or detention of persons suspected or convicted of offenses against the United States."[2] This

---

[1] Pub. L. No. 80-168, 61 Stat. 307 (1947) (providing for early retirement for Special Agents of the Federal Bureau of Investigation).

[2] 62 Stat. 1221 (1948).

language remains as the core definition of "law enforcement officer" in the retirement statutes in effect today.[3]

Petitioners are Diversion Investigators employed by the Drug Enforcement Administration. They, and their coworkers, spearhead a major component of the government's war against drugs. Unlike their Special Agent counterparts, Diversion Investigators do not focus their investigations on illicit drugs, but instead on legal pharmaceuticals diverted into illicit channels.

The Diversion program was created in 1970 as part of the Drug Enforcement Administration's (then the Bureau of Narcotics and Dangerous Drugs) implementation of the Controlled Substances Act.[4] During the 1960s and early 1970s, diversion of legal pharmaceuticals was rampant—a Congressional committee concluded that nearly half the amphetamines and barbituates manufactured in the United States were diverted into illicit channels and DEA estimated that roughly two-thirds of all drug-related deaths and injuries in the country were caused by drugs diverted from the lawful market.[5] Stories about "diet pills" and tranquilizers were common media fare and the tragedy of Karen Ann Quinlan,

---

[3] 5 U.S.C. § 8331(20) (defining "law enforcement officer" under the Civil Service Retirement System); 5 U.S.C. § 8401(17) (defining "law enforcement officer" under the Federal Employees Retirement System).

[4] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (1970).

[5] Evaluation of the Diversion Control Program, U.S. Department of Justice Drug Enforcement Administration Planning and Inspection Division (May 1, 1983), *reprinted in Hannon v. Department of Justice*, No. 99-3354 (Fed. Cir.), Joint Appendix at 202, 211.

whose coma was popularly attributed to abuse of quaaludes and alcohol, dominated the media for months.[6]

DEA tasked its Diversion Investigators with the primary responsibility for investigating the diversion of licit pharmaceuticals at the retail, or practicioner, level. Diversion Investigators investigated physicians, clinics, and pharmacies for purposes of pursuing criminal prosecution. In 1975, this Court decided a diversion case, holding that a physician could be prosecuted under § 841 of the Controlled Substances Act.[7] In 1980, DEA reported that Diversion Investigators had identified 94 priority retail targets in 23 major cities resulting in 28 convictions with additional indictments outstanding. The first 20 physicians convicted were responsible for diverting over 18 million dosage units of scheduled drugs.[8] Diversion investigations continue to this day.[9]

Petitioners Hannon and Townsend are typical of the Diversion Investigators DEA has employed. Hannon identified over 50 criminal cases he investigated during his brief tenure as a non-supervisory Diversion Investigator; the MSPB Administrative Judge who heard the evidence concluded that Hannon easily satisfied the statutory standard and the Board on review concluded that he "spent a majority of his time . . . in support of criminal investigations." App. E

---

[6] *See, e.g.*, Gilbert Cant, *Valiumania*, N.Y. TIMES MAGAZINE, Feb. 1, 1976, at 34; *Karen's Precedent*, TIME MAGAZINE, Apr. 12, 1976, at 50; *In the Matter of Karen Ann Quinlin* (Warren V. Bush Productions 1977) (made-for-television movie).

[7] *United States v. Moore*, 423 U.S. 122 (1975).

[8] *Hannon v. Department of Justice*, No. 99-3354 (Fed Cir.), Joint Appendix at 223.

[9] Yesterday's diet pills and quaaludes have moved over for today's OxyContin. *See, e.g.*, Fox Butterfield, *Theft of Painkiller Reflects its Popularity on the Street*, N.Y. TIMES, July 7, 2001, at A6; *Playing with Pain Killers*, NEWSWEEK, Apr. 9, 2001, at 44.

at 32a. Similarly, the Administrative Judge characterized the evidence that Townsend was conducting criminal investtigations as "overwhelming." App. G at 81a.

Notwithstanding these findings, the court below held that petitioners were not "law enforcement officers." Applying factors endorsed by the court below in *Bingaman v. Department of Treasury*,[10] such as whether petitioners were authorized to carry firearms and whether they were on call 24 hours a day, and adding the "gloss on the statutory language" that petitioners had to show that their criminal investigatory duties were hazardous, App. A at 8a, the court below refused to accord petitioners law enforcement status.

Since deciding petitioners' cases, the court below has grappled with another law enforcement officer case, *Watson v. Department of the Navy*.[11] In *Watson*, the court sought to distance itself from its previous decisions in *Bingaman* and *Hannon*. The court stated that it "had never adopted the *Bingaman* factors," and acknowledged that those factors "do not always distinguish between officers who do LEO work and those who do not." [12] In an effort to be "more faithful to the language of the statutes and the regulations," [13] the court endorsed yet another test, this one focused on factors such as whether the position has a maximum hiring age or a mandatory retirement age and whether the officer is exposed to hazard or danger. Notwithstanding its discrediting of the *Bingaman* factors, however, and its tacit recognition that the *Bingaman* analysis had no statutory foundation, the court held

---

[10] 127 F.3d 1431, 1436 (Fed. Cir. 1997).

[11] No. 00-3387, 2001 U.S. App. LEXIS 18574 (Fed. Cir. Aug. 17, 2001).

[12] *Id.* at *24.

[13] *Id.* at *7.

that "[t]he six *Bingaman* factors may also be considered as necessary and appropriate." [14]

REASONS FOR GRANTING THE PETITION

This case presents questions of substantial public importance concerning the construction of the statutes that govern retirement compensation for federal law enforcement officers. As the Federal Circuit has exclusive jurisdiction over claims arising under these statutes, there is no active circuit split on this issue. Nonetheless, there are thousands of federal employees in dozens of federal agencies who, by the plain terms of the statutes, qualify for law enforcement officer compensation, and several hundred of these employees have active claims for such benefits.

With its decisions below, the Federal Circuit has flouted Congress's unambiguous and explicit terms, ignored the pertinent regulations of the Office of Personnel Management, and sanctioned an analysis that it subsequently recognized was largely unrelated to the question of who qualifies as a law enforcement officer. Review by this Court is necessary to provide guidance on this issue of vital importance to Federal agencies and thousands of current and future law enforcement officers and to ensure that the court below gives proper respect to Congress and the administrative agency with delegated authority to implement the statutes at issue here.

1. The Federal Circuit has issued three decisions over the past four years seeking to apply Congress's explicit definition of the term "law enforcement officer." In each of these decisions, the Court has strayed from the plain language of the statute and OPM's implementing regulations. Its most recent decisions criticize their predecessors, but refuse to disavow them. Instead, they merely formulate new and

---

[14] *Id.* at *26.

additional criteria, further obscuring the statutory standard. Review by this Court is necessary to give effect to Congress's expressed intent and resolve an issue that has perplexed the court below for years.

For federal retirement purposes, Congress has defined a "law enforcement officer" as an "employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."[15] In *Bingaman*, after characterizing this definition and OPM's regulations as providing "only the most general guidance," the court endorsed a six-factor test that included such unrelated inquiries as whether the employee carried a weapon and worked for long periods without a break.[16] In *Hannon*, after making a point to disavow genesis of the *Bingaman* factors, the court went on add a seventh factor–hazard.[17] Most recently, in *Watson*, the court recognized the infirmity of the *Bingaman/Hannon* approach and, in the name of greater fealty to the language of the statutes and regulations, endorsed an entirely different approach, with five new factors.[18] Just the same, the court advised that the *Bingaman* factors could still be used "as necessary and appropriate."[19]

Each of the court's decisions is flawed at a fundamental level. *Bingaman*'s principal flaws, that its announced standards are not derived from the statute and do not distinguish between law enforcement officer duties and other duties, were recognized by the court of appeals in *Watson*.[20]

---

[15] 5 U.S.C. § 8331(20); *see also* 5 U.S.C. § 8401(17) (including this language in the definition of law enforcement officer under FERS).

[16] 127 F.3d at 1436.

[17] App. A at 4a.

[18] *Watson*, 2001 U.S. App. LEXIS 18574 at *26.

[19] *Id.*

[20] *Id.* at *13-*21, *24.

In *Hannon*, the court held that the degree of hazard faced by the employee was a consideration in determining law enforcement officer status and a "permissible gloss on the statutory language." [21] Yet, as the D.C. Circuit previously held, Congress "made clear that the degree of hazard to which an employee is exposed is irrelevant to his 'law enforcement officer' status." [22] Finally, *Watson* adopted a standard that purportedly is "more faithful to the language of the statutes and regulations," [23] but in fact at most substitutes different extra-statutory standards for the discredited (but not disavowed) *Bingaman* factors.

Petitioners' claims are representative of hundreds pending before the Merit Systems Protection Board and hundreds more pending before the United States Court of Federal Claims. Review by this Court is necessary to establish a coherent framework for analyzing these cases. The court below and the Merit Systems Protection Board have vacillated so much in their analyses over the past years that federal employees serving at the same post and in the same job have been accorded different law enforcement officer status.[24] Indeed, some employees who obtained credit for some years were later denied credit for subsequent years while serving in the same job.[25] The statutory and regulatory framework is far from complex. Review by this Court is necessary to put an end to the Federal Circuit's peregrinations

---

[21] App. A at 8a.

[22] *Obremski v. Office of Personnel Management*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983).

[23] 2001 U.S. App. LEXIS 18574 at *7.

[24] *Compare Bremby v. Department of the Navy*, 81 M.S.P.R. 450 (1999) (granting LEO coverage) *with Watson v. Department of the Navy*, 86 M.S.P.R. 318 (2000) (denying coverage).

[25] *See, e.g., Bingaman*, 127 F.3d at 1434.

and to articulate a standard that is truly consistent with the statutory language and OPM's regulations.

2. Statutory construction begins with the language of the statute, and "where the statutory language provides a clear answer it ends there as well." [26] In its decisions in *Hannon*, *Bingaman*, and *Watson*, the court below strayed from this fundamental precept of statutory construction and impermissibly engrafted new standards where Congress has expressly spoken. Review by this Court is necessary to corral the Federal Circuit's forays into judicial legislation and halt its encroachment on Congress's exclusive domain.

The task before the court below in these cases as well as in *Bingaman* and *Watson* was to define the meaning of the term "law enforcement officer" as it appears in the relevant statutes. The starting point for this endeavor, and ending point, is the express language of the statute. Congress defined the term, and that definition necessarily "excludes any meaning that is not stated." [27] Thus, the court below erred in sanctioning such inquiries as whether petitioners carried guns, were "frontline law enforcement officers" [28] or faced unusual hazards in their employment. The critical, and indeed, sole criterion is whether petitioners' duties were "primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."

Were any further explication of the term necessary (and neither the MSPB nor the court below ever suggested that the statutory definition was ambiguous), then the best place to look for clarification would have been Congress's definition of "criminal investigator" as that term is used to define the

---

[26] *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

[27] *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

[28] App. A at 6a-7a.

subset of law enforcement officers who are entitled to availability pay. In meticulous detail, Congress laid out what it considered to be the specific characteristics of criminal investigators, including, for example, the ability to "recognize, develop and present evidence . . . in various legal hearings and court proceedings," and to "apply the full range of knowledge, skills, and abilities necessary for cases which are complex and unfold over a long period of time."[29] Congress did not mention carrying a firearm, working for long periods without a break, or degree of hazard. Yet these are the standards the court below chose to apply rather than those provided by Congress.

Similarly, the court below erred in reading the legislative history as supporting its conclusion that degree of hazard is relevant. In 1974, Congress rewrote the definition of law enforcement officer, repealing the requirement that "full consideration . . . be given to the degree of hazard" encountered by an employee.[30] Notwithstanding this repeal, the *Hannon* court concluded that "[n]othing in [the] history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status."[31] But a "change in language [must] be read, if possible, to have some effect,"[32] and thus the *Hannon* court's facile attempt to write hazard back into the statute cannot be countenanced.

---

[29] 5 U.S.C. § 5545a(a)(2).

[30] Pub. L. No. 93-350, 88 Stat. 355 (1974).

[31] App. A at 10a.

[32] *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992); *see also Obremski*, 669 F.2d at 26 n.31 (noting that the 1974 amendment "made clear" that degree of hazard was irrelevant and quoting floor debate to the effect that enhanced retirement benefits were not intended "as a reward to an employee for his having performed hazardous duties").

In any event, the legislative history the court relied on provides no support for the court's conclusion. First, the court relied on legislative history of the 1986 enactment of an entire new retirement system (FERS) to discern congressional intent in the 1974 amendment of the Civil Service Retirement Act. But legislative history from a subsequent Congress cannot "fix the meaning of language it did not even draft."[33] More fundamentally, however, the cited legislative history says nothing at all about hazard. Rather, the cited committee report explains only the expansion of the definition of law enforcement officer to include the requirement that the position entail rigorous duties.[34]

The *Hannon* court's reliance on extra-statutory standards and reincorporation of hazard into the definition of a law enforcement officer flouts congressional intent and conflicts with a prior decision of the D.C. Circuit. Review by this Court is necessary to assure that Congress's intent, and not some divination by the court below, controls the determination of which federal employees are properly characterized as law enforcement officers.

3. The court below not only failed to heed Congress's explicit language, but also erred in refusing to defer to OPM's regulations implementing the statute at issue. "Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer;"[35] nevertheless, the *Hannon* court failed even to mention, much less give considerable weight to, OPM's regulations. Review by this Court is necessary to ensure

---

[33] *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

[34] S. Rep. No. 96-166, at 41 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1466.

[35] *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

that the Federal Circuit accords proper respect to agency interpretations of statutes they are charged with administering.

Congress has expressly delegated the administration of the civil service retirement statutes, including the authority to prescribe regulations thereunder, to the Office of Personnel Management.[36] OPM has prescribed such regulations; specifically, it has explained that the definition of law enforcement officer "does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States."[37]

Although OPM has been entrusted with administering these statutes, never in the quarter century since the 1974 amendments has OPM seen fit to promulgate anything resembling the factors the *Hannon* court considered. Under *Chevron* and *Mead*, the court below was not at liberty to ignore OPM's construction of the statutes at issue and propound entirely new standards of its own. OPM's regulations defined the term law enforcement officer "in a reasonable way in light of the Legislature's design," and are therefore entitled to "controlling weight."[38] Because the court below accorded *no* weight to OPM's regulations, review by this Court is necessary to protect OPM's role in administering the civil service retirement statutes.

4. In *Watson*, the Federal Circuit recognized the infirmity of the *Bingaman/Hannon* analysis and endorsed yet another complicated approach to this simple issue. But *Watson* does

---

[36] 5 U.S.C. §§ 8347(a), 8461(g).

[37] 5 C.F.R. §§ 831.902, 842.802.

[38] *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998).

not cure the problems the court below and the MSPB have been grappling with over the past decade. Rather, *Watson*, which itself is deeply flawed, only compounds the court's errors and confounds the resolution of law enforcement officer claims.

The *Watson* court purported to adopt an analysis that is "more faithful to the language of the statutes and the regulations" than the *Bingaman/Hannon* approach.[39] Specifically, the court held that the proper analysis requires examining the reasons for the existence of the position in question, as opposed to the particular duties of the incumbent of that position. But in adopting this "position-oriented" approach, the court focused on only one of several pertinent parts of OPM's regulations[40] and made no inquiry whether this construction was consistent with the regulatory scheme as a whole. It is not.

Specifically, OPM's regulations provide that an employee may request credit for service and in doing so "must provide . . . all pertinent information *regarding duties performed*" including, for law enforcement officers, "a list of the provisions of the Federal criminal law the incumbent is responsible for enforcing and arrests made."[41] The regulations do not even mention, much less require, evidence of the reasons for the existence of the position.

Similarly, the *Watson* court listed as critical factors whether the position has a maximum entry age or a mandatory retirement age.[42] But agencies are statutorily precluded from creating maximum entry ages for positions,

---

[39] 2001 U.S. App. LEXIS 18574 at *7.

[40] *Id.* at *9-*10 (citing 5 C.F.R. §§ 831.902 and 842.802, which define primary duties for CSRS and FERS, respectively).

[41] 5 C.F.R. § 831.906(a) (emphasis added).

[42] 2001 U.S. App. LEXIS 18574 at *26.

except for those positions *they* designate as law enforcement officer positions.[43] And, if an agency designates a position as a law enforcement officer position, the employee occupying that position would not need to apply for law enforcement officer credit. Thus, this purportedly "probative" factor would never be present in a challenge brought by an employee claiming that he is entitled to law enforcement officer status.[44] Similarly, mandatory retirement is a *consequence* of serving in an LEO position, not an indicia of such a position.[45] Agencies have no authority to impose mandatory retirement requirements for their positions; rather, their only authority in this regard is to designate positions as law enforcement officer positions.[46]

Watson thus hinges entitlement to law enforcement officer status on factors that can only exist if the agency has determined that the position is entitled to LEO coverage. But OPM's regulations explicitly provide that employees may seek coverage even if their employing agencies have not designated their positions as law enforcement officer positions.[47] Thus, far from being "more faithful" to OPM's

---

[43] 5 U.S.C. § 3307 (allowing maximum entry ages for Park Police Officers, air traffic controllers, firefighters, nuclear materials couriers and law enforcement officers).

[44] *Watson* at *26.

[45] 5 U.S.C. § 8335 ("a law enforcement officer . . . shall be separated from service . . . [at] 57 years of age"); 5 U.S.C. § 8425 (identical provision for FERS).

[46] 5 C.F.R §§ 831.903(a), 842.803(a).

[47] *See, e.g.*, 5 C.F.R. § 831.906 (captioned "Requests from individuals" and providing a mechanism for employees to seek coverage); 5 C.F.R. § 831.907(b) (providing a mechanism for collecting retirement contributions in "cases in which it is finally determined that past service of a current or former employee" was subject to the higher contribution rate for law enforcement officers).

regulations, *Watson*, like *Bingaman* and *Hannon*, flouts those regulations.

Thus, the court's decision in *Watson* serves only to heighten the need for this Court to grant review in this case. The court below has hopelessly muddled the analysis for determining whether a federal employee is entitled to law enforcement officer credit for his work. Congress's simple statutory language and OPM's equally plain implementing regulations have been mangled into a mishmash of conflicting and extra-statutory standards. Review by this Court is necessary to end this era of uncertainty and vacillation and provide the hundreds of federal employees with pending claims for law enforcement retirement credit with a workable standard that is consistent with Congress's plain language and OPM's implementing regulations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

MICHAEL J. KATOR*
BRITA DAGMAR STRANDBERG
KATOR, PARKS & WEISER
1020 19th Street, N.W.
Suite 350
Washington, D.C. 20036-6101
(202) 898-4800

* Counsel of Record

August 29, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-3354

JAMES T. HANNON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

DECIDED: DECEMBER 7, 2000

Before LINN, *Circuit Judge*, FRIEDMAN and PLAGER*, *Senior Circuit Judges.*

FRIEDMAN, *Senior Circuit Judge.*

This petition for review challenges the decision of the Merit Systems Protection Board ("Board"), sustaining the agency's determination that the petitioner was not a law enforcement officer and therefore was not entitled to enhanced retirement benefits under 5 U.S.C. § 8331(20). We affirm.

I

Federal law enforcement personnel may retire under the Civil Service Retirement System at age fifty with enhanced benefits after "completing 20 years of service as a law enforcement officer." 5 U.S.C. § 8336(c). The basic facts relating to Hannon's service, as set forth in the Board's decision and the record, are largely undisputed.

---

* Judge Plager assumed senior status on November 30, 2000.

Hannon was employed as a diversion investigator in the Drug Enforcement Administration ("agency") between 1972 and 1979, and as a supervisory and administrative diversion investigator from 1979 forward. As the job title suggests, a diversion investigator investigates the diversion of controlled substances from legitimate distribution channels to illegal ones. He inspects and audits manufacturers and distributors of such substances to assure that their products have not been so diverted. The work includes determining compliance with record keeping procedures, security safeguards, and other requirements of the Controlled Substance Act. 21 U.S.C. §§ 801-904.

Diversion investigators also participate in criminal investigations. Under agency policy, however, they cannot carry firearms, make arrests, execute search warrants, make undercover purchases, control confidential informants, or conduct moving surveillance. The latter functions are performed by the agency's special agents.

Hannon applied to the agency for enhanced retirement credit as a law enforcement officer. After the agency denied the application, Hannon appealed to the Board.

In his initial decision, the Board's administrative judge concluded that Hannon had been a law enforcement officer. *Hannon v. Dep't of Justice*, No. DC-0831-95-0565-I-1 (M.S.P.B. Apr. 30, 1997). The administrative judge stated that Hannon "testified in great detail [that] he conducted surveillances of suspect doctors' and pharmacists' places of business; interviewed patients and customers of the suspects and the suspects themselves, giving Miranda warnings when necessary; attempted consensual telephone calls between a cooperating individual and a suspect to obtain incriminating evidence; obtained and executed administrative inspection warrants; served as an affiant to obtain search warrants and then participated in searches; analyzed records as possible evidence; carried out controlled deliveries of marked drug shipments;

issued administrative subpoenas for telephone records and obtained judicial subpoenas for handwriting exemplars; monitored and recorded undercover buys from nearby cars; and testified before grand juries and at trials in federal and state courts." He noted that Hannon's supervisor and Illinois State Police Sergeant Rodek, who worked with Hannon on some criminal cases, both confirmed that he did that work. The administrative judge concluded that Hannon's activities "show that he was involved in criminal investigations," even though he was prohibited from "carrying weapons, making undercover purchases, controlling and paying confidential informants, making arrests and executing search warrants, and conducting surveillances," and "was not on call 24 hours a day, and that he did not work extensive amounts of overtime."

The Board reversed. *Hannon v. Dep't of Justice*, No. DC-0831-95-0565-I-1 (M.S.P.B. June 11, 1999). After analyzing Hannon's duties in light of the standards articulated in our decision in *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1436 (Fed. Cir. 1997), which we decided after the initial decision in this case and which we discuss below, the Board concluded:

> Although the evidence shows that the appellant spent a majority of his time during the 1972 and 1978 period in support of criminal investigations, we find, based on consideration of all the relevant factors, that the appellant's primary duties as a Diversion Investigator did not constitute the "'frontline law enforcement work,' entailing unusual physical demands and hazards," that is required for primary LEO service credit. The primary factor supporting such coverage was his work interviewing witnesses and suspects, sometimes in locations that were potentially hazardous. But he did not carry a firearm, did not have the authority to make arrests or execute search warrants, was not on call 24 hours a day, and was not required to maintain a significant level of physical fitness. [Citation omitted.]

II

A. A "law enforcement officer" is defined in 5 U.S.C. § 8331(20) as

> an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

We strictly construe the definition of law enforcement officer. *Bingaman*, 127 F.3d at 1435 (quoting *Ryan v. Merit Sys. Prot. Bd.*, 779 F.2d 669, 672 (Fed. Cir. 1985)).

In *Bingaman*, we described the six factors that the Board had developed to determine whether a particular employee qualified as a law enforcement officer as "captur[ing] the essence of what Congress intended." *Id.* at 1436. Thus, a law enforcement officer "commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness." *Id.* (citations omitted). No single factor, however, is "essential or dispositive." *Id.*

The Board has placed the further gloss on the definition of law enforcement officer that the critical factor in determining whether a particular position so qualifies is whether it involves "'frontline law enforcement work,' entailing unusual physical demands and hazards." *Peek v. Office of Pers. Mgmt.*, 63 M.S.P.R. 430, 433-34 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (table).

B. Four of the six indicia of law enforcement officer status specified in *Bingaman* are not present here. Hannon concedingly was not authorized to and did not carry a firearm and was not on call twenty-four hours a day. The Board found that

two other indicia—being required to maintain a level of physical fitness and frequent direct contact with criminal suspects—were not met. It stated that even if the agency's physical standards for diversion investigators were applicable here (which the government denies), those standards

> were not particularly rigorous. They specified, *inter alia*, that DI's must: have vision correctable to not less than 20/40 in at least one eye; be able to hear conversational speech at twenty feet; have "distinct speech and free breathing"; lift and carry cartons of records and containers of controlled substances; do extensive walking and standing; and do moderate lifting and carrying. These descriptions are consistent with the appellant's testimony. He described "sometimes spending a lot of time running around in a warehouse, moving boxes, moving drums around to try and get accurate counts," and "[s]tanding on your feet for long periods of time going through the inventory process . . . . To me, that's fairly rigorous." We disagree. These activities do not bespeak being required to maintain a significant level of physical fitness, especially when compared to circumstances cited by the Board when finding LEO status. *Cf. Bremby*, slip op. ¶ 20 (citing testimony that Police Officers had been removed for physical inability to pursue or grapple with a suspect, and that officers must have the capability to run, walk, and climb over rough and unfamiliar terrain, fences and other obstacles for extended periods of time); *Ferrier*, 66 M.S.P.R. at 245 (incumbents had to pass a five-event Physical Fitness Battery). [Record citations omitted.]

The Board also found that Hannon's "job activities did not include frequent direct contact with criminal suspects." Substantial evidence—much of it Hannon's own testimony—supports that finding. The Board cited (1) agency guidelines that permitted Hannon to conduct only stationary surveillance, which Hannon testified "involved basically stationing myself

with another investigator across the street [from a pharmacy or doctor's office] and watching who came and went"; (2) Hannon's description of his work to arrange telephone calls between cooperating individuals and a suspect, which merely involved "asking [the cooperating individual] to call . . . the doctor and place an order [for drugs.]"; (3) Hannon's statement that he obtained and executed administrative subpoenas and inspection warrants but almost never executed a judicial search warrant; (4) Hannon's testimony "that he was present at the execution of only a dozen or so searches, and four or five arrests, during his entire career"; (5) Hannon's statement that he watched when controlled deliveries of marked drug shipments were made but did not deliver any himself; and (6) Hannon's testimony that he merely monitored undercover purchases by waiting in a car with a special agent, who was authorized to carry a gun, while another special agent made the purchase.

In considering whether Hannon worked for long periods without a break, another *Bingaman* indicium, the Board acknowledged the testimony that Hannon worked three or four hours overtime each week and "worked long stretches without a break" but concluded, in light of the lack of a vigorous physical standard and unusual hazards, that Hannon's work activities did not involve rigorous working conditions.

The Board ruled that the record showed the presence of the remaining *Bingaman* indicia: "We conclude that a significant portion of the appellant's time spent interviewing witnesses and suspects was consistent with law enforcement work, and that some of this work held a significant potential for hazard."

After evaluating Hannon's duties under the *Bingaman* factors, the Board concluded:

> Although the evidence shows that the appellant spent a majority of his time during the 1972 and 1978 period in support of criminal investigations, we find, based on consideration of all the relevant factors, that the appellant's

> primary duties as a Diversion Investigator did not constitute the "'frontline law enforcement work,' entailing unusual physical demands and hazards," that is required for primary LEO service credit. The primary factor supporting such coverage was his work interviewing witnesses and suspects, sometimes in locations that were potentially hazardous. But he did not carry a firearm, did not have the authority to make arrests or execute search warrants, was not on call 24 hours a day, and was not required to maintain a significant level of physical fitness. [Citation omitted.]

Hannon contends that the Board improperly gave insufficient weight to those of his activities it found to support law enforcement officer status and failed to give proper weight to other evidence supporting that conclusion. For example, he asserts that although the Board found that he interviewed witnesses and suspects, it erred in not finding that he had frequent direct contact with criminal suspects.

The determination of factual issues and the drawing of appropriate inferences from them is for the Board, not for this reviewing court. We cannot say that the Board's findings, upon which it based its determination that Hannon was not a law enforcement officer, are not supported by substantial evidence.

C. We next consider whether the Board's determination that Hannon was not a law enforcement officer was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 U.S.C. § 7703(c).

Hannon argues that the Board misapplied the *Bingaman* factors. It was the Board, not this court, that developed those factors. 127 F.3d at 1436 (citing *Hobbs v. Office of Pers. Mgmt.*, 58 M.S.P.R. 628 (1993); *Sauser v. Office of Pers. Mgmt.*, 59 M.S.P.R. 489 (1993); *Peek v. Office of Pers. Mgmt.*, 63 M.S.P.R. 430 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (table); *Ferrier v. Office of Pers. Mgmt.*, 66 M.S.P.R. 241 (1995)). In *Bingaman*, we merely recognized and applied the

factors the Board had adopted as "captur[ing] the essence of what Congress intended". *Id.*

In *Peek*, one of the cases in which the Board developed the *Bingaman* factors, the Board stated that "eligibility for preferential retirement credit [as a law enforcement officer is determined by the position's] character as 'frontline law enforcement work,' entailing unusual physical demands and hazards." 63 M.S.P.R. at 433-34. In the present case, the Board properly followed and applied that principle in concluding that the administrative judge "correctly addressed the existence and degree of hazard associated with the appellant's duties as one of many factors that was entitled to consideration."

Hannon argues that the Board erred in even considering work hazard in concluding that he was not a law enforcement officer. The Board consistently has recognized, however, that hazard is a significant element of law enforcement work. *See, e.g., Ferrier*, 66 M.S.P.R. at 244 (distinguishing "criminal investigation from non-criminal investigation include[s the factor of] unusual physical hazards for the investigator arising from frequent contacts with criminals and suspected criminals"); *Peek*, 63 M.S.P.R. at 434 (determining "eligibility for preferential retirement credit [depends on whether a position] entail[s] unusual physical demands and hazards"); and *Saucer*, 59 M.S.P.R. at 492 ("determining whether an employee's duties primarily involved criminal investigations [included considering] whether the employee's work involved unusual physical hazards"). That is a permissible gloss on the statutory language.

Hannon contends, however, that the legislative history indicates that work hazard is not an appropriate factor for the Board to consider in determining law enforcement officer status. The 1948 statute providing more favorable retirement for law enforcement officers generally, stated that, in evaluating applications for early retirement, the Civil Service Commission "shall give full consideration to the degree of hazard to which such officer or employee is subjected in the performance of his

duties." Act of July 2, 1948, ch. 807, 62 Stat. 1221. The same provision also required an employee seeking such early retirement first to request law enforcement status from either the Civil Service Commission or, as authorized by a later statute, from the head of his or her agency.

In 1974, Public Law No. 93-350, 88 Stat. 355 (codified in 5 U.S.C. § 8331(20)), deleted the language requiring the consideration of hazard. At the same time, it also deleted the requirement that an employee seeking early retirement must first obtain prior recognition of his law enforcement officer status from the Civil Service Commission or the agency head.

The deletion of the requirement that the Civil Service Commission or the agency head must "give full consideration to" the hazard element does not establish, as Hannon argues, that the Board (the Commission's successor) was thereby precluded from even considering that factor. Indeed, the legislative history of the 1974 statute and a later statute that created the law enforcement officer requirement under the Federal Employee Retirement System—history that this court in *Bingaman* quoted from and relied upon—is consistent with the conclusion that hazard is an important aspect of a law enforcement officer's work. As *Bingaman* stated, the Senate Committee Report

> stated that "law enforcement officer" was defined "to mean an employee with rigorous law enforcement duties that require young and vigorous individuals." S.Rep. No. 96-166, at 41 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1405, 1446. The definitions of "firefighter" and "law enforcement officer," according to the report, were meant to "include only positions with duties requiring young and physically able employees," and were designed to "exclude other positions associated with firefighting and/or law enforcement which are not necessarily physically demanding." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. 1405, 1411.

127 F.3d at 1435-36. The 1974 Committee Report also noted that the reason for this change was to delete the requirement that, before obtaining early retirement, the employee must first obtain a ruling on law enforcement officer status, because that requirement had dissuaded some law enforcement officers from seeking early retirement. S. Rep. No. 93-948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 3699.

Nothing in this history shows, or even suggests, that Congress intended to prohibit consideration of hazard in determining law enforcement officer status.

Hannon further contends that the Board misapplied the *Bingaman* factors by engrafting onto them the additional requirements that the employee had suffered "actual harm" or "unusual hazard" or that his life had been threatened. The argument is based upon passing comments in the Board's opinion, which cannot properly be read as imposing those requirements as elements of law enforcement status.

D. In his reply brief, Hannon for the first time argues that the language of 5 U.S.C. § 8331(20), defining "law enforcement officer" as someone whose duties "are primarily the investigation, apprehension, or detention of individuals suspected or convicted" of federal criminal offenses, is clear on its face. He asserts that his work met that standard and that the "new standards" the Board has "engraft[ed]" for determining that status are therefore unauthorized. This argument, not made in Hannon's lengthy opening brief and to which the government had no opportunity to respond, comes too late. *See Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("[A]n issue not raised by an appellant in its opening brief . . . is waived.").

E. Hannon's arguments basically adopt and follow the administrative judge's theory that Hannon was a law enforcement officer because "he was involved in criminal investigations." That is not the standard, however, that the Board applies in determining the question. Something more is

required before the employee can be said to have engaged in the "'frontline law enforcement work,' entailing unusual physical demands and hazards" that is necessary for "a particular position" to "qualif[y]" as a "law enforcement officer" under 5 U.S.C. § 8331(20).

In *Bingaman*, there were none of the indicia of law enforcement officers status. The employees claiming that status conduct surveillance from aircraft and "identify particular aircraft or boats as likely smuggling vessels and relay their findings to ground crews that apprehend the suspected smugglers. The [employees] do not conduct the apprehension of the suspected smugglers on the ground and do not have direct personal contact with suspects." 127 F.3d at 1433. This court upheld the Board's determination that none of the employees had established their entitlement to law enforcement officer retirement credit.

Other cases in which the Board held that the employees' work did not establish that status similarly involved less indicia than the present case. For example, in *Tyrrell v. Department of Veterans Affairs*, 83 M.S.P.R. 493 (1999), the Board ruled that hospital police officers, whose primary duties involve providing security and insuring compliance with traffic and parking procedures at a hospital, were not law enforcement officers because they did not have frequent direct contact with criminal suspects although there was some potential for danger. Similarly, in *Hobbs*, the Board ruled that an Alcohol, Tobacco and Firearms special inspector was not entitled to law enforcement credit because the inspector "was not required to maintain a level of physical fitness, work overtime frequently, be on call 24 hours a day, carry a weapon or maintain proficiency in the use of a weapon, or give *Miranda* warnings to the witnesses whom he interviewed in the course of his investigations. Nor did he generally have contacts with suspected or known criminals." 58 M.S.P.R. at 633 n.5 (1993).

In contrast, cases in which the Board held that law enforcement officer status had been established involved greater indicia of such status than Hannon's work. Thus, in *Ferrier*, a Fish and Wildlife police officer who arrested suspects and whose experience included a "high-speed car chase through a residential area [which ended when the officer] pursued [the suspect] over a ten-foot wall before apprehending and arresting him" was a law enforcement officer. 66 M.S.P.R. at 246; *see also Bremby v. Dep't of the Navy*, 81 M.S.P.R. 450, 457 (1999) (Naval base police had "frequent contact with criminal suspects," regularly were required to report for duty at all hours, and were required to maintain a level of physical fitness); *Taylor v. Dep't of the Treasury*, 68 M.S.P.R. 693 (1995) (an explosives enforcement officer investigated crime scenes, collected evidence, interviewed witnesses and suspects, prepared and executed search warrants, rendered explosive and incendiary devices safe, and carried a weapon); *Sauser*, 59 M.S.P.R. at 494 (a customs inspector and customs patrol officer "frequently pursued and helped apprehend suspected criminals in situations involving great danger to himself[,] has completed advanced tactical firearms instruction, . . . and [was] a member of a high-risk Warrant Entry Tactical Team involving the use of special weapons and tactics").

Hannon's work fell somewhere between activities that had been held to be law enforcement officer work and those that had been held not to be so. As noted, two of the indicia of that status concedingly are absent. The Board found that another two—maintaining a level of physical fitness and frequent direct contact with criminal suspects—had not been shown. With respect to the two other criteria, the Board found that one had been met and stated that, although Hannon had testified that he had worked long hours without a break (the remaining factor), his work did not involve vigorous working conditions. Looking at the totality of the evidence—and no single factor is "essential or dispositive," *Bingaman*, 127 F.3d at 1436—the Board

concluded that Hannon's "primary duties as a Diversion Investigator did not constitute the "'frontline law enforcement work,' entailing unusual physical demands and hazards," that is required for [law enforcement officer] service credit."

The evaluation of and weight to be given to the various *Bingaman* factors and the other evidence in the record are judgment calls that rest primarily within the discretion of the Board. Here the Board, "based on consideration of all the relevant factors," concluded that Hannon had not established law enforcement officer status. Since the Board considered the relevant factors, it is not our function to substitute our judgment for that of the agency regarding the weight to be given them. That is a task for the Board, not the reviewing court. *Cf. Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604 (1950) (Secretary complied with Sugar Act of 1948 requirement that, in allotting sugar quotas, he "tak[e] into consideration" three factors when, after considering them, he concluded that one of them "could not fairly be applied" and "g[a]ve no weight to this factor." *Id.* at 608-09. "The Secretary may conclude, after due consideration, that in the particular situation before him it is not essential that each of the three factors be quantitatively reflected in the final allotment formula." *Id.* at 613.).

We review the Board's ultimate determination whether a particular employee is a law enforcement officer under 5 U.S.C. § 8331(20) under an arbitrary and capricious standard. *See* 5 U.S.C. § 7703(c); *Morgan v. Office of Pers. Mgmt.*, 773 F.2d 282, 285 (1985). We cannot say that, considering all the circumstances, the Board's decision that Hannon was not a law enforcement officer was arbitrary and capricious.

CONCLUSION

The decision of the Merit Systems Protection Board denying Hannon law enforcement officer credit is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-3354

JAMES T. HANNON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Michael J. Kator, Kator, Scott & Parks, P.L.L.C., of Washington, DC, argued for petitioner. With him on the brief were *Irving Kator*, and *Cathy Harris*.

Scott D. Austin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for respondent. With him on the brief were *David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director; and *James M. Kinsella*, Deputy Director. Of counsel was *James E. Hicks*, Attorney, Office of Chief Counsel, Administrative Law Section, Drug Enforcement Administration, of Washington, DC.

Appealed from: Merit Systems Protection Board

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed May 1, 2001]

99-3354
(MSPB—DC 0831950565-I-1)

HANNON,

v.

JUSTICE.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 8, 2001.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: May 1, 2001

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed Jan. 11, 2001]

00-3014

RONALD J. TOWNSEND,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). DC 0842950656-I-1.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MICHEL, SCHALL, and GAJARSA, *Circuit Judges*):

AFFIRMED. *See* Fed. Cir R. 36.

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBALY
Clerk

DATED: Jan. 11, 2001

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed May 1, 2001]

00-3014
(MSPB—DC 0842950656-I-1)

TOWNSEND,

v.

JUSTICE.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on May 8, 2001.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY
Clerk

Dated: May 1, 2001

APPENDIX E

MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC-0831-95-0565-I-1

JAMES T. HANNON,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

June 11, 1999

As Corrected June 15, 1999.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision, issued April 30, 1997, that reversed its determination that the appellant is not entitled to law enforcement officer (LEO) service credit under the Civil Service Retirement System (CSRS).[1] For the reasons discussed below, we GRANT the

---

[1] In the proceeding below, the administrative judge (AJ) consolidated Hannon's appeal with that of Ronald Townsend, MSPB Docket No.

agency's petition and REVERSE the initial decision. The agency's determination that the appellant is not entitled to LEO service credit is SUSTAINED.

BACKGROUND

The appellant sought primary LEO credit for his service from 1972 to 1978 as a front-line Diversion Investigator (DI) in the GS-1810 series, and secondary credit thereafter as a supervisor and administrator with the Drug Enforcement Administration (DEA).[2] Initial Decision (ID) at 15. DIs work in the DEA's Diversion Program, whose mission is to conduct investigations for the purpose of prosecuting and convicting individuals (doctors and pharmacists) and organizations involved in the illegal diversion of legal pharmaceuticals and the chemicals that go into those drugs. ID at 13. The Diversion Program, which was created soon after the implementation of the Controlled Substances Act in 1971, includes Special Agents in the GS-1811 series as well as Diversion Investigators in the GS-1810 series. *Id.* at 15.

The appellant first requested LEO coverage in July 1989. In a final decision issued on May 19, 1995, the agency determined that he was not entitled to such coverage. Initial Appeal File (IAF), Tab 6, Subtab 2A. This appeal followed.

The appellant testified that his duties as a primary DI included the following: surveillance of suspect doctors' and pharmacists' places of business; interviewing patients and

---

DC-0842-95-0656-I-1, who had applied for LEO service credit under the Federal Employees' Retirement System (FERS). We have separated the two appeals on review because the Townsend appeal deals with issues peculiar to FERS. A decision as to Appellant Townsend will be issued separately.

[2] An employee engaged in investigation, apprehension, or detention occupies a "primary" LEO position. An employee transferred from such a position to a supervisory or administrative position occupies a "secondary" LEO position. *See* 5 C.F.R. § 831.902.

customers of the suspects and the suspects themselves; giving *Miranda* warnings when necessary; attempting consensual telephone calls between a cooperating individual and a suspect to obtain incriminating evidence; obtaining and executing administrative inspection warrants; serving as an affiant to obtain search warrants and then participating in searches; analyzing records as possible evidence; carrying out controlled deliveries of marked drug shipments; issuing administrative subpoenas for telephone records and obtaining judicial subpoenas for handwriting exemplars; monitoring and recording undercover buys from nearby cars; and testifying before grand juries and at trials in federal and state courts. *Id.* at 16.

Based on this and other testimony and evidence of record, the administrative judge (AJ) found that the appellant's duties were "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," as required for LEO service credit by 5 U.S.C. § 8331(20). The AJ acknowledged that the appellant did not perform a number of duties often associated with law enforcement officers—he did not carry a weapon, make undercover purchases, control or pay confidential informants, make arrests, or execute search warrants—but found that these factors were not controlling. *Id.* at 17-18.

ANALYSIS

Governing Legal Standards

Under the CSRS, an employee in an LEO position becomes eligible for an annuity at a younger age and with fewer years of service, and that is computed at a higher rate, than an employee in a non-LEO position. *See* 5 U.S.C. §§ 8336(c), 8339(a), (d). In addition, an LEO employee is subject to mandatory early retirement. 5 U.S.C. § 8334(c). The legislative intent behind these special provisions was Congress's

determination that LEO positions should be "composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Felzien v. Office of Personnel Management*, 930 F.2d 898, 901 *(Fed. Cir. 1991)* (quoting S. Rep. No. 948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 2699).

In order to qualify for LEO retirement coverage under 5 U.S.C. § 8336(c), an employee must show that the duties of his position are "primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. § 8331(20). The Board has identified several job activities and requirements that are associated with entitlement to LEO service credit under the CSRS: (1) frequent direct contact with criminal suspects; (2) authorization to carry a firearm; (3) interrogation of witnesses and suspects, giving *Miranda* warnings when appropriate; (4) working for long periods without a break; (5) being on call 24 hours a day; and (6) being required to maintain a level of physical fitness. *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997); *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 26-27 (1998). No single factor is essential to or dispositive of LEO coverage. *Bingaman*, 127 F.3d at 1437.

The court recognized in *Bingaman* that the Board has taken a "narrow" approach to the definition of "law enforcement officer" for the purpose of determining eligibility for LEO retirement credit. *Id. at 1437.* In *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 433-34 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (Table), the Board stated that "it is not a position's efficacy or its contribution to a particular law enforcement mission which determines eligibility for preferential retirement credit, but rather its character as 'frontline law enforcement work,' entailing unusual physical demands and hazards."

Relying on this last quotation and similar statements in our case law, the agency contends that a significant element of hazard is essential to LEO coverage. The Board has stated on several occasions that the existence and degree of physical hazard is a factor to be considered in determining entitlement to LEO service credit. *See, e.g., Bremby v. Department of the Navy*, MSPB Docket No. DC-0831-97-0806-I-1, slip op. P17 (Apr. 15, 1999); *Taylor v. Department of the Treasury*, 68 M.S.P.R. 693, 698 (1995), *aff'd as amended on recons.*, 72 M.S.P.R. 327 (1996), review denied, 106 F.3d 427 (Fed. Cir. 1997) (Table). The AJ correctly found, however, that the existence of physical hazard is just one of many factors that may be considered. ID at 8-11.

Prior to an amendment in 1974, the law expressly required consideration of the degree of hazard:

> The head of the [employing] agency and the Civil Service Commission shall consider fully the degree of hazard to which the employee is subjected in the performance of his duties, instead of the general duties of the class of the position held by the employee.

5 U.S.C. § 8336(c) (1970).[3]

Public Law No. 93-350, 88 Stat. 355 (1974), deleted the above language regarding consideration of hazard from section 8336(c), and added the current definition of law enforcement officer codified at 5 U.S.C. § 8331(20). The legislative history of that Act does not contain any specific discussion of the reason for eliminating the language regarding the hazardous nature of duties. It does, however, emphasize the physical vitality required for law enforcement work:

---

[3] The requirement that consideration be given to the degree of hazard was added by Public Law No. 879, ch. 807, 62 Stat. 1221 (1948).

> The history of retirement legislation dealing with law-enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire.

S. Rep. No. 93-948, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 3698, 3699.

In *Hobbs v. Office of Personnel Management, 58 M.S.P.R. 628, 633 (1993),* the Board considered the legislative history of section 8331(20), and found it "ambiguous as to whether and to what extent the hazardous nature of an employee's duties should be considered in determining his entitlement to LEO retirement credit," explaining that,

> Criminal investigations, as distinguished from other types of investigations, involve unusual physical hazards for the investigator, deriving from frequent contacts with criminals and suspected criminals, and their desire to avoid criminal prosecution. Although . . . the existence or degree of hazards, in itself, may not be an appropriate factor to consider in determining an employee's LEO status, it is beyond cavil that the hazards inherent in frontline LEO duties, such as conducting criminal investigations, are precisely why physical stamina and vigor are necessary to overcome or minimize such hazards.

Id. at 633.

Accordingly, we conclude that the AJ correctly addressed the existence and degree of hazard associated with the appellant's duties as one of many factors that was entitled to consideration.

The appellant's primary job duties did not constitute "frontline" law enforcement duties of the sort required for LEO service credit.

In determining whether an appellant meets the requirements of establishing his entitlement to LEO retirement coverage, the Board must examine all relevant evidence, including position descriptions. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345, remanded, 22 F.3d 1106 (Fed. Cir. 1994) (Table), *recons. denied*, *66 M.S.P.R. 241 (1995)*. As the applicant for a retirement benefit, the appellant bears the burden of proving his entitlement to it by preponderant evidence. *See* 5 C.F.R. § 1201.56(a)(2).

As the AJ acknowledged, the appellant's position description as a primary DI did not support LEO status. It emphasized regulatory investigations and listed support of the criminal investigative program as the last of a number of major duties. *Id.* at 19; IAF, Tab 6, Subtab 2II-4. The AJ correctly recognized, however, that the appellant's actual duties, and not his position description, control his entitlement to LEO coverage. *Felzien, 930* F.2d at 903; *Taylor*, 68 M.S.P.R. at 696. As the AJ acknowledged, it is undisputed that the appellant did not meet two of the relevant factors—authorization to carry a firearm, and being on call 24 hours a day. *Id.* at 16-17.

Frequent Direct Contact with Criminal Suspects

One of the six factors to be considered in determining LEO status is whether the employee has frequent direct contact with criminal suspects. *Bingaman*, 127 F.3d at 1437. Although the AJ did mention this factor, *Id.* at 13, he did not

explicitly evaluate the appellant's job duties against it. He did cite several job duties performed by the appellant that might implicate this factor: surveillance of suspect doctors' and pharmacists' places of business; attempting consensual telephone calls between cooperating individuals and suspects to obtain incriminating evidence; obtaining and executing administrative inspection warrants; carrying out controlled deliveries of marked drug shipments; issuing administrative subpoenas for telephone records and obtaining judicial subpoenas for handwriting exemplars; and monitoring and recording undercover buys. *Id.* at 16. In each instance, the evidence shows that the appellant's job activities did not include frequent direct contact with criminal suspects, and that they were not unusually hazardous. *Cf. Killion v. Department of the Treasury*, MSPB Docket No. BN-0831-96-0006-I-1 (Sept. 16, 1998) (infrequent contact with criminal suspects or hazardous situations disqualifies an employee for LEO coverage); accord, *Eatmon v. Department of Energy*, 79 M.S.P.R. 96, P21 (1998).

Surveillance. Under applicable agency guidelines, the appellant could conduct only stationary (as opposed to moving) surveillance. App's Exs. C-D, IAF, Tab 27. The appellant himself testified that stationary surveillance "involved basically stationing myself with another investigator across the street [from a pharmacy or doctor's office] and watching who came and went." Dec. 13 Tr.[4] at 244.

Attempting consensual telephone calls between a cooperating individual and a suspect. According to the appellant, this involved "asking them [the cooperating individual] to call . . . simply call the doctor and place an

---

[4] The hearing was held on Dec. 12-15, 1995, and on January 4, 1996. The written transcript (Tr.) from the hearing is separately paginated for each day of the hearing.

order and go pick it up. Ask them to do it and record the conversation." Dec. 13 Tr. at 223.

Obtaining and executing administrative subpoenas and inspection warrants. This involved inspections of professionals—physicians and pharmacists—who were registered with the DEA, and who knew they were subject to DEA's various reporting and other requirements. Jan. 4 Tr. at 191-93 (Haislip[5]). The appellant admitted that the subjects of these subpoenas and inspection warrants almost always cooperated, and that he almost never had to get a judicial search warrant. Dec. 14 Tr. at 59-60. We note in this regard that OPM's regulation specifically provides that "guarding against or inspecting for violations of law" is not LEO work. 5 C.F.R. § 831.902.

Searches and Arrests. The appellant never executed a judicial search warrant. His participation was limited to entering the premises to conduct a search after the premises were secured by Special Agents. *See* Dec. 14 Tr. at 65 (Appellant); Dec. 12 Tr. at 92-93 (Burke[6]); Dec. 14. Tr. at 232-33 (Special Agent London). In any event, the appellant testified that he was present at the execution of only a dozen or so searches, and four or five arrests, during his entire career. Dec. 14 Tr. at 64. Any involvement in these activities was thus an incidental rather than a primary duty. *See* 5 C.F.R. § 831.902.

Controlled deliveries of marked drug shipments. The appellant testified that, in a "controlled delivery," "state or local people that we were working with" would pose as a driver for a commercial delivery service to assure that a particular delivery took place. Dec. 13 Tr. at 229. The appellant watched as these deliveries took place. *Id.* at 229-30.

---

[5] Gene Haislip is the head of the Diversion Program. Jan. 4 Tr. at 122.

[6] Terrence Burke is a former Acting Deputy Administrator with the DEA. Dec. 12 Tr. at 13.

Monitoring undercover buys. The appellant testified that he monitored undercover buys by waiting in a car, accompanied by a Special Agent, and using a listening device while another Special Agent made an undercover purchase. Dec. 13 Tr. at 224; Dec. 14 Tr. at 40-41.

Interrogation of Witnesses and Suspects

Another job duty that may be indicative of LEO status is interrogation of witnesses and suspects, giving *Miranda* warnings when appropriate. *Bingaman, 127 F.3d at 1431*. As the AJ found, the appellant did interview patients and customers of the suspects and the suspects themselves, giving *Miranda* warnings when necessary. *Id.* at 16. The appellant did not have frequent occasion to give *Miranda* warnings, however. He recalled two specific instances, but indicated that there were several more. Dec. 13 Tr. at 281.

The AJ found that the appellant's testimony, together with that of Carl Eckman and Sgt. Edward Rodek,[7] established that the appellant, during the years at issue, located and interviewed witnesses after hours and after dark at some of Chicago's worst crime areas where police officers had been shot and that suspects in some of his investigations kept weapons in their offices or had armed guards. The AJ also found that Sgt. Rodek testified that some suspects were addicts themselves or mentally unstable and therefore presented additional risks to the appellant. *Id.* at 18.

The AJ's findings were supported by the testimony of Mr. Eckman and Sgt. Rodek. Mr. Eckman was a Special Agent who supervised and worked with the appellant. He testified that work on the Suarez case, which occupied about a 10-month period, involved "nothing but gang bangers that we had to go out and find and interview, bad people, the dregs."

---

[7] Carl Eckman is a DEA Special Agent. Sgt. Rodek is an officer with the Illinois State Police. *Id.* at 14, 16.

Dec. 13 Tr. at 81. He said that "the areas we frequented 99 percent of the time on that case were all heavily dangerous . . . there are policemen that don't even go in there." *Id.* at 87. Sgt. Rodek testified that he believed the appellant's duties at pharmacies also involved a degree of danger, because many of the pharmacies that they dealt with were not in good neighborhoods, because it was not uncommon for a pharmacist to have a gun behind the counter, and because some of these pharmacists were somewhat unstable mentally and were drug addicts themselves. *Id.* at 120-21.

Despite the testimony about bad neighborhoods and the potential for danger, neither the appellant nor Sgt. Rodek recounted any incident in which the appellant was ever assaulted, threatened, or otherwise in any actual danger while doing an interview. Dec. 14 Tr. at 38 (Appellant); Dec. 13 Tr. at 130 (Rodek). Moreover, the appellant was never required to go into a "bad" neighborhood without the protection of an armed escort. He was encouraged to request a Special Agent or a local law enforcement officer to accompany him if he believed there might be danger. Dec. 14 Tr. at 61-62 (Appellant); Dec. 12 Tr. at 233-34 (London); Dec. 13 Tr. at 54-55 (Coleman); Jan. 4 Tr. at 148 (Haislip). Sgt. Rodek, who worked with the appellant on a daily basis from 1972 to 1975, and less frequently thereafter, testified that he could recall only one case that might have involved work in an unsafe neighborhood. Dec. 13 Tr. at 125-27; *see Killion, supra.*

In finding that the appellant's job duties did include hazardous circumstances, the AJ cited four documents: a 1988 memorandum by Mr. Haislip, the head of the Diversion Program; studies of the Diversion Program conducted in 1983 and 1990; and an excerpt from the 1974 Agent's Manual. *Id.* at 17-18. As the agency points out in its petition for review, three of these documents were created after the appellant's duties as a primary DI had ended, and all were general in nature, as opposed to relating to the appellant's actual duties.

As the AJ observed, three of the four documents cited the "stressful and hazardous work of DI's at narcotic treatment programs." *Id.* at 17. However stressful or hazardous such work might have been in general, the appellant testified about only one investigation at a narcotics treatment facility, and said he never experienced any danger while he was working there. Dec. 14 Tr. at 57-58.

The AJ cited the 1988 memorandum for the "emotional reaction of doctors and pharmacists when confronted with evidence of violations of law." *Id* at 17. The appellant testified, however, that he visited doctors' offices and pharmacies during regular working hours, that these individuals were generally cooperative, not confrontational, and that arrest warrants were generally not required because doctors and pharmacists would turn themselves in. Dec. 14 Tr. at 19-20, 59-60, 64. Special Agent Steven Bushendorf also testified that visiting doctors and pharmacists was not unsafe. Dec. 15 Tr. at 155-56.

We conclude that a significant portion of the appellant's time spent interviewing witnesses and suspects was consistent with law enforcement work, and that some of this work held a significant potential for hazard.

Being required to maintain a level of physical fitness

The AJ found that the appellant's work as a DI during the 1972 to 1978 period involved "rigorous working conditions that required unusual physical demands and vigor." *Id.* at 19. In so finding, he cited "formal physical standards adopted in 1989." *Id.* at 18. The AJ also cited the testimony of several individuals, as follows: Terrence Burke, former Acting Administrator and Deputy Administrator, who said he thought these standards had been in place since the inception of the Diversion Program in 1971, but was told that they had never been finalized; Jean D. Mathis, Assistant Administrator for Human Resources, who testified that physical require-

ments did exist for DI positions and that they had existed since she began working for the DEA in 1975; and the appellant, who recalled that he was required to take a medical examination before he was hired in 1972. *Id.* at 18-19.

As the agency points out in its petition for review, not only were the 1989 "standards" promulgated many years after the appellant's service as a primary DI had ended, there was no proof that they were ever adopted. The physical standards, contained in Appellant's Exhibit G, were accompanied by a memorandum from Mr. Haislip, the Director of the Diversion Program, which described the standards as "proposed," not adopted. IAF, Tab 27. Mr. Burke testified that "there is not a physical standard that I'm aware of for the entry level for the 1810." Dec. 12 Tr. at 92. Ronald Buzzeo, whose entire career since 1973 had been in the Diversion Program and who was the Deputy Director of the Program for many years, testified that although he had been under the impression that there were physical standards, he was later informed by DEA's Personnel Office that they had never been finalized or implemented. *Id.* at 155.

Even if the standards of Exhibit G had been in effect, they were not particularly rigorous. They specified, *inter alia*, that DI's must: have vision correctable to not less than 20/40 in at least one eye; be able to hear conversational speech at twenty feet; have "distinct speech and free breathing"; lift and carry cartons of records and containers of controlled substances; do extensive walking and standing; and do moderate lifting and carrying. IAF, Tab 27. These descriptions are consistent with the appellant's testimony. He described "sometimes spending a lot of time running around in a warehouse, moving boxes, moving drums around to try and get accurate counts," and "standing on your feet for long periods of time going through the inventory process . . . . To me, that's fairly rigorous." Dec. 14 Tr. at 68. We disagree. These activities do not bespeak being required to maintain a significant level of

physical fitness, especially when compared to circumstances cited by the Board when finding LEO status. *Cf. Bremby*, slip op. P20 (citing testimony that Police Officers had been removed for physical inability to pursue or grapple with a suspect, and that officers must have the capability to run, walk, and climb over rough and unfamiliar terrain, fences and other obstacles for extended periods of time); *Ferrier*, 66 M.S.P.R. at 245 (incumbents had to pass a five-event Physical Fitness Battery).

Working for long periods without a break

The AJ cited the testimony of Mr. Eckman that the appellant worked late two to three nights a week, and the appellant's testimony that he typically worked overtime three or four hours per week. *Id.* at 19. Although acknowledging that this alone would not support a finding that the appellant's position involved rigorous working conditions, the AJ found that such a conclusion was warranted when considered together with other evidence—the agency's physical standard, the hazards of the position, and the appellant's testimony that he worked long stretches without a break, stood for long periods while conducting stationary surveillance, and was called into work after hours on dozens of occasions. *Id.* In addition, the appellant testified that interviews with patients most often had to be conducted in the evening hours. Dec. 13 Tr. at 279.

As discussed above, we disagree with the AJ's findings that the appellant's position entailed a vigorous physical standard and that it involved unusual hazards. Although the remaining activities cited by the AJ are worthy of consideration, we do not find them unusually rigorous or physically demanding.

CONCLUSION

Although the evidence shows that the appellant spent a majority of his time during the 1972 to 1978 period in support of criminal investigations, we find, based on consideration of all the relevant factors, that the appellant's primary duties as a Diversion Investigator did not constitute the "'frontline law enforcement work,' entailing unusual physical demands and hazards," that is required for primary LEO service credit. *See* Peek, 63 M.S.P.R. at 433-34. The primary factor supporting such coverage was his work interviewing witnesses and suspects, sometimes in locations that were potentially hazardous. But he did not carry a firearm, did not have the authority to make arrests or execute search warrants, was not on call 24 hours a day, and was not required to maintain a significant level of physical fitness. Given our finding that the appellant is not entitled to primary LEO service credit, he would have no entitlement to secondary LEO service credit for his post-1978 service as a supervisor and administrator. *See* 5 U.S.C. § 8331(20); 5 C.F.R. § 831.902.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

ROBERT E. TAYLOR
Clerk of the Board
Washington, D.C.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET Number

DC-0842-95-0656-I-1

RONALD J. TOWNSEND [1]

Appellant,

v.

DEPARTMENT OF JUSTICE,

Agency.

DATE: August 31, 1999

Irving Kator and Tracy L. Hilmer, Esquires, Kator, Scott & Heller, Washington, D.C., for the appellants.

John R. Caterini and James J. Roby, Esquires, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision, issued April 30, 1997, that reversed its determination that the

---

[1] In the regional office proceeding, the administrative judge (AJ) consolidated Townsend's appeal with that of James Hannon, who had applied for LEO service credit under the Civil Service Retirement System (CSRS). The Board has previously issued a decision finding that Hannon is not entitled to LEO service credit. *Hannon v. Department of Justice*, MSPB Docket No. DC-0831-95-0565-I-1 (June 11, 1999).

appellant is not entitled to law enforcement officer (LEO) service credit under the Federal Employees' Retirement System (FERS), 5 U.S.C. §§ 8401(17), 8412(d). For the reasons discussed below, we GRANT the agency's petition, AFFIRM the initial decision insofar as it found that the appeal should not be dismissed because the appellant's formal request for LEO coverage was untimely filed, and REVERSE the initial decision insofar as it found that the appellant is entitled to LEO service credit. The agency's determination that the appellant is not entitled to LEO service credit is SUSTAINED.

BACKGROUND

The appellant was hired on February 16, 1986, as a Diversion Investigator (DI), GS-1810-7, in the Drug Enforcement Administration (DEA). Although he was hired within the Civil Service Retirement System (CSRS), he transferred to the FERS system effective January 1, 1987, and received various promotions after that. Initial Decision (ID) at 22. DIs work in the DEA's Diversion Program, whose mission is to conduct investigations for the purpose of prosecuting and convicting individuals (doctors and pharmacists) and organizations involved in the illegal diversion of legal pharmaceuticals and the chemicals that go into those drugs. ID at 13. The Diversion Program includes Special Agents in the GS-1811 series as well as DIs in the GS-1810 series. ID at 15.

The appellant filed a formal request for LEO coverage on August 2, 1989, in which he sought primary LEO coverage under CSRS from the date of his initial appointment in 1986 until January 1, 1987, and primary coverage thereafter under FERS. Initial Appeal File (IAF), Tab 3, Subtab 2u. In a decision issued June 29, 1995, the agency determined that the appellant was not entitled to LEO coverage. *Id.*, Subtab 1. On appeal to the Board, the appellant also sought secondary

coverage under FERS as a supervisor for the period after his promotion to supervisory status on July 1, 1991.[2]

Following a hearing, the agency moved to dismiss the appeal for lack of jurisdiction on the basis that the appellant's August 1989 request was untimely under 5 C.F.R. §§ 842.804(c). IAF, Tab 32. That regulation provides that a FERS employee must file a formal, written request for LEO coverage within six months after entering the position in question, or within six months of any significant change in the position. The regulation further provides that failure to make a timely request will result in a presumption that the agency head's determination of non-coverage was correct, unless the employee can show that he was unaware of his status, or that he was prevented from making a timely request by cause beyond his control.

Because it was undisputed that the appellant's formal request for LEO coverage was submitted well after the six-month time limit specified in the regulation, the AJ considered whether the appellant had shown that he was unaware of his status or was prevented by cause beyond his control from requesting that his official status be changed. The AJ found that the appellant had not established either of these circumstances. ID at 4-6. The AJ further found that the appellant had not shown that the time limit should be excused under the doctrine of equitable tolling under either *Irwin v.*

---

[2] Duties are said to be primary when they are paramount in influence and weight, occupy a substantial portion of the employee's working time over a typical work cycle, and are assigned on a regular and recurring basis. 5 C.F.R. §§ 842.802. Duties are said to be secondary for an employee whose primary duties are as a first-level supervisor of law enforcement officers or in an administrative position for which experience in a rigorous law enforcement position is a prerequisite. *See* 5 C.F.R. §§ 842.802-.803. An employee cannot qualify for secondary LEO service credit unless he transfers directly to the supervisory or administrative position from a primary LEO position. 5 U.S.C. §§ 8401(17)(C).

Department of Veterans Affairs, 498 U.S. 89 (1990), or *Shiflett v. U.S. Postal Service*, 839 F.2d 669 (Fed. Cir. 1988). *Id.* at 6-7. Nevertheless, the AJ concluded that the agency had waived the untimely request by issuing a decision on the merits of the appellant's request for LEO coverage, i.e., whether he established that his position met the requirements of 5 U.S.C. §§ 8401(17), instead of denying the appellant's request on the basis that it was untimely filed. ID at 7-8. The AJ then considered the merits issue, and concluded that the appellant was entitled to LEO coverage.

In its petition for review, the agency contends that the AJ erred in finding that it had waived the requirements of 5 C.F.R. §§ 842.804(c), and in finding that the appellant was entitled to LEO service credit.

ANALYSIS

The agency waived any noncompliance with section 842.804(c) when it issued a decision on the merits of the appellant''s entitlement to LEO service credit.

At the time the initial decision was issued, the Board had held that compliance with section 842.804(c) was a jurisdictional prerequisite to a Board appeal of an agency's decision that an employee was not entitled to LEO service credit. *See Caponio v. Department of the Treasury*, 73 M.S.P.R. 671, 675-78, *review dismissed*, 124 F.3d 224 (Fed. Cir. 1997) (Table); *DeVitto v. Department of Transportation*, 64 M.S.P.R. 354, 357-58 (1994). The Board has subsequently held, however, that the filing deadline of section 842.804(c) is neither jurisdictional in nature, nor a substantive condition of eligibility for LEO service retirement credit; it is instead a procedural requirement which the Board will deem the employing agency to have waived if it did not raise it at the time of determining an employee's eligibility for LEO service credit. *See Dusenberry v. Department of Justice*, 81 M.S.P.R.

12, ¶¶ 6 (1999); *Trivett v. Department of the Navy*, MSPB Docket No. PH-0842-97-0426-I-1, slip op. ¶¶ 4-5 (July 21, 1999).

In the instant case, the agency denied the appellant's request for LEO service credit on the merits, i.e., it determined that the appellant's position did not meet the statutory and regulatory requirements for LEO service credit identified in 5 U.S.C. §§ 8401(17) and Subpart H of 5 C.F.R. Part 842. The agency's decision contained no discussion whatever of the timeliness of the appellant's request. IAF, Tab 3, Subtab 1. By issuing a decision on the merits, the agency waived the time limit of section 842.804(c). Whether the appellant met either of the exceptions of that section is irrelevant.

The appellant did not establish his entitlement to LEO service credit.

To be entitled to LEO service credit under FERS, the appellant must show that he meets the definition of a law enforcement officer set forth at 5 U.S.C. §§ 8401(17). In pertinent part, "law enforcement officer" means an employee, the duties of whose position is primarily (1) "the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States," and (2) "are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." *Id.*; *Fitzgerald v. Department of Defense*, 80 M.S.P.R. 1, 22-23 (1998). As the applicant for a retirement benefit, the appellant bears the burden of proving his entitlement to it by preponderant evidence. *Houck v. Department of the Navy*, 82 M.S.P.R. 7, ¶¶ 5 (1999).

In determining whether an appellant has established his entitlement to LEO service credit, the Board will consider all relevant factors, including the individual's position

description. *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 345, *remanded*, 22 F.3d 1106 (Fed. Cir. 1994) (Table), *recons. denied*, 66 M.S.P.R. 241 (1995). Some of the factors associated with entitlement to LEO service credit are: (1) frequent direct contact with criminal suspects; (2) authorization to carry a firearm; (3) interrogation of witnesses and suspects, giving *Miranda* warnings when appropriate; (4) working for long periods without a break; (5) being on call 24 hours a day; and (6) being required to maintain a level of physical fitness. *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997); *Fitzgerald*, 80 M.S.P.R. at 26-27. In addition to these general factors, the Board has emphasized that "it is not a position"'s efficacy or its contribution to a particular law enforcement mission which determines eligibility for [LEO] retirement credit, but rather its character as "frontline law enforcement work," entailing unusual physical demands and hazards." *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 433-34 (1994), *aff'd*, 59 F.3d 181 (Fed. Cir. 1995) (Table); *see also Bingaman*, 127 F.3d at 1437-38; *Hannon*, slip op. ¶¶ 8, 29.

Regarding the appellant's claim for primary LEO coverage during the 1986 to 1991 period, the Board found in *Hannon* that Diversion Investigators as a group do not meet several of the indicia of law enforcement work: (1) the DI position description emphasizes regulatory investigations and lists support of the criminal investigation program as the last of a number of major duties; (2) DIs do not carry firearms; (3) DIs do not make undercover purchases, or control or pay confidential informants; (4) DIs do not make arrests or execute search warrants; and (5) DIs are not required to maintain a high level of physical fitness. *See Hannon*, slip op. ¶¶ 5, 15, 24-26.

The evidence regarding the other factors is similar to the evidence adduced in *Hannon*. As in *Hannon*, the record indicates that the appellant sometimes had to work in bad

neighborhoods and deal with unsavory individuals, that he interrogated witnesses and suspects, giving *Miranda* warnings where appropriate, that he sometimes worked long and irregular hours, and that the businesses'' premises he visited were sometimes unclean and uncomfortable. ID at 22-24. The appellant has not adduced evidence, however, indicating that his duties were any more rigorous or hazardous than were Hannon's. *See* IAF, Tab 33, at 51-66.

Over half of the appellant's duties during the 1986 to 1991 period may well have been in support of criminal investigations. As in *Hannon*, however, the evidence shows that, based on all the relevant factors, the appellant's primary duties as a Diversion Investigator did not constitute the "''frontline law enforcement work,'' entailing unusual physical demands and hazards," that is required for primary LEO service credit. *Hannon*, slip op. ¶¶ 29 (quoting *Peek*, 63 M.S.P.R. at 433-34); IAF, Tab 34, at 31-53. Given our finding that the appellant is not entitled to primary LEO service credit, he can have no entitlement to secondary LEO service credit for his later service as a supervisor. *See* 5 U.S.C. §§ 8401(17)(C).

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. §§ 1201.113(c)). notice to the appellant regarding your further review rights

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals for the Federal Circuit 717 Madison Place, N.W. Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. §§ 7703). You may read this law as well as review other related material at our web site, http:\\www.mspb.gov.

FOR THE BOARD:
WASHINGTON, D.C.

ROBERT E. TAYLOR
CLERK OF THE BOARD

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

Docket Number
DC-0831-95-0565-I-1
DC-0842-95-0656-I-1

JAMES J. HANNON AND
RONALD J. TOWNSEND, *et al.*,
Appellants,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: April 30, 1997

Irving Kator and Tracy L. Hilmer, Esquire, Kator, Scott & Heller, Washington, D.C., for the appellants.

John R. Caterini and James J. Roby, Esquire, Washington, D.C., for the agency.

BEFORE

William C. Jenkins
Administrative Judge

INITIAL DECISION

INTRODUCTION

Appellants filed timely appeals from the May 19, 1995, and June 29, 1995, final decisions of the agency finding that they were not entitled to law enforcement officer (LEO)

service credit under the Civil Service Retirement System (CSRS), 5 U.S.C. § 8336(c), and the Federal Employees Retirement System (FERS), 5 U.S.C. § 8412(d). For the following reasons I find that both appeals are within the Board's jurisdiction and that the decision of the agency in both cases must be REVERSED.[1]

ANALYSIS AND FINDINGS

Jurisdiction

Appellant Hannon seeks LEO credit under CSRS for his service between 1972 and the present as a front line Diversion Investigator (DI) (primary time) and as a supervisor and administrator (secondary time) with the agency's Drug Enforcement Administration (DEA). He filed his first request for such credit in July 1989 (H-Ag. File, Tab 2II) and subsequently filed periodic updates requesting continuing LEO coverage. The agency issued a final decision on May 19, 1995, denying appellant's requests for LEO credit. (H-Ag. File, Tab 2A). Because Hannon's rights and interests under CSRS were affected by the agency's decision he is entitled to appeal that decision to the Board. 5 U.S.C.

---

[1] Pursuant to a September 19, 1995, order granting the parties' joint motion, the following seven appeals filed by agency employees whose requests for LEO service credit were also denied were consolidated with the appeals of appellants Hannon and Townsend: *Ann L. Carter v. Department of Justice*, MSPB Docket No. DC-0831-95-0569-I-1; *David A. Walkup v. Department of Justice*, MSPB Docket No. DC-0831-95-0658-I-1; *George T. Gitchell v. Department of Justice*, MSPB Docket No. DC-0831-95-0679-I-1; *Roxanne L. Peterson v. Department of Justice*, MSPB Docket No. CH-0842-95-0991-I-1; *Roger A. Hartman v. Department of Justice*, MSPB Docket No. CH-0842-95-0992-I-1; *James T. Tillman v. Department of Justice*, MSPB Docket No. CH-0842-95-1033-I-1; and *Paul V. Galvin v. Department of Justice*, MSPB Docket No. CH-0842-95-1069-I-1. (Appeal File (AF), Tab 14). This initial decision serves as a partial initial decision in all of the consolidated appeals on the common legal issues. *Id.*

§ 8347(d); 5 C.F.R. § 831.910(a).[2] For the same reasons, that portion of appellant Townsend's appeal concerning the agency's June 30, 1995, decision denying his request for LEO credit for his CSRS service as a DI from February through December 1986 is also within the Board's appellate jurisdiction.

Effective January 1, 1987, Townsend was transferred to FERS. On August 2, 1989, he requested LEO credit for his service as a DI from 1986 to the date of his request. (T-Ag. File, Tab 2U). He subsequently submitted annual updates to that request. In its June 29, 1995, final decision the agency determined that appellant was not entitled to LEO service credit under FERS for any of the positions he has held with DEA. (T-Ag. File, Tab 1). Final agency decisions affecting an individuals rights or interests under FERS are appealable to the Board. 5 U.S.C. § 8461(e)(1); 5 C.F.R. § 842.807(a). The agency's 1995 final decision advised Townsend that he could appeal to the Board. Subsequently, however, in a motion to dismiss filed after completion of the Board hearing, the agency for the first time asserted that appellant's August 1989 request for LEO coverage of his FERS service was untimely under 5 C.F.R. § 842.804(c) and, pursuant to decisions of the Board, not within the Board's jurisdiction.

Section 842.804(c) provides that if an employee is in a FERS position that has not been designated by the agency as an LEO position:

> . . . and does not, *within 6 months* after entering the position or after any significant change in the position, formally and in writing seek a determination from the employing agency that his position is properly covered

---

[2] Because appellant's initial request was filed prior to September 30, 1989, it permissibly covers any period of prior service. 5 C.F.R. § 831.908(e)(1988); *See Elias v. Department of Defense*, MSPB Docket No. SF-0831-96-0037-I-1, (Jan. 9, 1997).

> by the higher withholding rate, the agency head's determination that the service was not so covered is presumed to be correct. This presumption may be rebutted by a preponderance of the evidence that the employee was unaware of his or her status or was prevented by cause beyond his or her control from requesting that the official status be changed at the time the service was performed.

Because Townsend's first request for LEO coverage was not filed until August 1989, clearly more than six months after he became covered by FERS, the agency, in its motion to dismiss and replies to appellant's opposition, contends that its determination that appellant is not entitled to LEO service credit is not subject to challenge and is thus not within the Board's jurisdiction. It also maintains that appellant has not established that he was unaware of his retirement status or that there were any circumstances beyond his control that prevented him from requesting LEO coverage, and that none of the grounds for waiver of a filing deadline articulated by the Board is present in the case. In his opposition to the agency's motion appellant argues that section 842.804(c) is not jurisdictional and is subject to waiver and equitable tolling. In this regard he asserts that equitable tolling of the deadline is required here because the agency never advised him of the 6-month deadline and because it misled him into believing that he need take no action to preserve his FERS LEO request and that there were no procedures apart from those provided for CSRS LEO requests for obtaining a final agency decision.[3]

---

[3] In considering the jurisdictional issue raised by the agency in its motion to dismiss I have accepted into the record all of the supplemental oppositions filed by appellants. In remanding the case in *Caponio*, 68 M.S.P.R. at 636, the Board emphasized the importance of developing a complete record on this issue. The agency's request to strike appellants' supplemental submissions is DENIED.

The Board has consistently held that the 6-month time limitation for filing LEO claims under FERS is jurisdictional. *See Caponio v. Department of the Treasury and Office of Personnel Management*, MSPB Docket No. SF-0842-95-0460-R-1 (April 1, 1997); *Fitzgerald v. Department of the Navy*, 70 M.S.P.R. 152, 155 (1996); *Caponio v. Department of the Treasury*, 68 M.S.P.R. 633, 635-36 (1995); *DeVitto v. Department of Transportation*, 64 M.S.P.R. 354, 357 (1995). The Board thus only has jurisdiction to hear appeals of agency denials of LEO service credit if the employee made the request within the 6-month time period or shows that he was unaware of his status or was prevented by circumstances beyond his control from requesting a change of official status. *Caponio*, 68 M.S.P.R. at 636. In *Caponio*, slip op. at 5, the Board recognized that this regulatory deadline could be waived if the criteria set forth in *Fox v. Office of Personnel Management*, 50 M.S.P.R 602, 605-06 (1991) were satisfied. A statutory or regulatory deadline may thus be waived when: (1) the statute or regulation itself specifies the circumstances in which the time limit may be waived; (2) the agency's affirmative misconduct precludes it from enforcing an otherwise applicable rule under the doctrine of equitable estoppel; or (3) the agency fails to provided notification of the deadline as required by statute or regulation. *Id.*

With regard to the latter criterion and appellant's contention that the agency never advised him of the 6-month time limit I find that no basis for waiver exists. The Board held in *Caponio*, slip op. at 9-10, that neither the FERS statute nor the applicable regulation, 5 C.F.R. § 842.804(c), places a duty on an employing agency to inform employees of their right to request a change in their status.[4] In addition, while appellant

---

[4] Because the agency had no notice obligation and because the FERS regulations, including section 842.804(c), were published in the Federal Register in 1987, 53 Fed. Reg. 2068 (Jan. 16, 1987), I find no merit to

contends that the agency misled him with regard to the requirements for filing for LEO credit under FERS, he points to no actions of the agency that occurred prior to the filing of his request in August 1989. At that time he had already occupied his DI position under FERS for more than two years. There is no showing, I conclude, that any affirmative misconduct of the agency was responsible for appellant's untimely filing.

With regard to the first *Fox* criterion, section 842.804(c), as noted above, does specify circumstances under which the 6-month deadline may be waived. The Board may thus review the agency's denial of his request for LEO credit if appellant shows that he was unaware of his non-LEO status or was prevented by circumstances beyond his control from requesting that his official status be changed at the time of his service in his DI position. *Caponio,* slip op. at 4. While appellant maintains that he does not recall receiving various agency publications explaining the then new FERS system, he does not claim that he was unaware that he became covered by FERS in January 1987 or deny receiving numerous Standard Form (SF) 50's documenting his coverage by the new retirement plan. For this reason, because he has not established or even alleged that he was unaware until 1989 that his DI position was officially identified by the agency as one not qualifying him for LEO service credit, and because he has not pointed to any circumstances beyond his control that prevented him from requesting until August 1989 that his official status be changed, I find that waiver of the 6-month deadline is not warranted under the regulatory standard of section 842.804(c).

I also find unsupported appellant's claim that equitable tolling of the time limit is required. In *Irwin v. Veterans*

---

appellant's related claim that he was denied his constitutional due process rights.

Administration, 498 U.S. 89, 111 S.Ct. 453, 457 (1990) the Supreme Court held that there is a rebuttable presumption that the doctrine of equitable tolling can be invoked in certain circumstances to excuse a untimely filed law suit against the government. The court noted that it had allowed equitable tolling in situations where a claimant had actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant was induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. *Id.* It also commented that the doctrine does not extend to mere excusable neglect. As the Board held in a decision in which it considered the application of the doctrine of equitable tolling, "appellant here has alleged no facts that would bring him within the doctrine . . . ." *Wood v. Department of the Air Force*, 54 M.S.P.R. 587, 593 (1992). Appellant Townsend has not alleged that he filed a timely but otherwise defective request for LEO service credit during the six months following his conversion to FERS nor has he claimed that he was tricked by any actions of the agency into letting the 6-month time limit pass. As noted above his allegations of misrepresentation are based on actions of the agency that followed the filing of his 1989 request.

I also find no merit to appellant's contention that equitable tolling is required under the court's decision in *Shiflett v. United States Postal Service*, 839 F.2d 669 (Fed.Cir. 1988). There the court found that good cause existed for the employee's untimely appeal to the Board because the agency had failed to give that employee the notice of her appeal rights required by regulation. *Id.* at 674. Here, as discussed above, the Board has already found that there is no statutory or regulatory requirement for an employing agency to inform employees of their right to request a change in their non-LEO status.

Nevertheless, for the following reasons I find that the agency itself has waived the untimely filing by appellant Townsend and that the Board therefore does have jurisdiction

over his appeal of it final decision denying his request for LEO service credit. No time limit for requesting LEO service credit under FERS is found in the statutory provisions that create the right to early retirement for law enforcement officers and define LEO service. 5 U.S.C. §§ 8401(17) and 8412(d)(2). It follows that there is no statutory basis for waiver that limits the circumstances under which the regulatory 6-month deadline established by OPM at 5 C.F.R. § 842.804(c) can be waived. *Cf. Jeter v. Office of Personnel Management*, 71 M.S.P.R. 495, 500 (1996) (employee not entitled to waiver of filing deadline where he did not establish basis for waiver under terms prescribed by statute). As it pertains to OPM and to the agency heads delegated authority to determine whether an employee is entitled to LEO service credit, § 842.804(c) is therefore a procedural rather than jurisdictional regulation that serves to control the orderly receipt and processing of LEO service requests. *Cf. Hamilton v. Merit Systems Protection Board*, 75 F.3d 639, 643-45 (Fed.Cir. 1996) (timeliness regulations directed to docket control and orderly procedures are procedural and not jurisdictional).

As a general rule it is within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it. *Hamilton*, 75 F.3d at 645 n.6. Here, while it sets forth a standard under which an employee can rebut the presumption that is created by an untimely LEO service request, section 842.804(c) does not address or limit the agency's authority to modify or waive on its own the 6-month deadline. Neither in the DEA's 1994 recommended denial of LEO credit for appellant under FERS nor in the agency's final June 1995 decision denying his request for such credit is there any finding on or even a reference to the timeliness of his request. Moreover, appellant presented evidence that the agency officials responsible for processing the numerous LEO FERS requests that were being filed by DI's decided not to enforce

the 6-month time limit and to handle the FERS requests the same as CSRS requests. (AF Tab 41—appellant's revised supplemental opposition, Exs. 1 and 3). In view of this acknowledged waiver of the deadline by agency personnel officials and the implicit acceptance of the waiver by the agency's final decision addressing only the merits of appellant LEO request, I find that the filing time limit was effectively waived by the agency. Under these circumstances the Board does have jurisdiction over the agency's June 29, 1995, final decision denying appellant Townsend's request for LEO service credit.

Legal standards for LEO service credit

CSRS

Under 5 U.S.C. § 8331(20) a law enforcement officer is defined as an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee who is engaged in this activity who is transferred to a supervisory or administrative position." OPM regulations at 5 C.F.R. § 831.902 set forth this same definition but then add that it "does not include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons other than persons who are suspected or convicted of offenses against the criminal laws of the United States."

In a series of recent decisions the Board has examined the legislative history of the CSRS provisions granting preferential retirement rights to LEO's, held that "investigation" under 5 U.S.C. § 8331(2) means "criminal investigation", and identified various characteristics and traditional indicia of criminal investigations and LEO status. In denying appellant's LEO request the agency in part relied upon its determination that appellant Hannon had not

established that he was required to perform work that involved unusual physical hazards. (H-Ag. File, Tab 2A). In response to appellant's appeal the agency again asserts that appellant did not perform physically dangerous, frontline work entitling him to LEO credit. (H-Ag. File, Tab 1). It in fact maintains that unusual physical danger or hazard is an essential element and the *sine qua non* of entitlement to LEO credit. (AF Tab 34—agency's closing brief). Appellant argues that the agency has misinterpreted and misapplied Board case law.

Relying on legislative history and the court's decision in *Felzien v. Office of Personnel Management*, 930 F.2d 898, 901 (Fed.Cir.1991) the Board held in *Hobbs v. Office of Personnel Management*, 58 M.S.P.R. 628, 632 (1993), that "one of the primary legislative reasons for enacting the preferential LEO retirement provisions was that the government's frontline law enforcement work required a youthful workforce capable of meeting the stringent physical requirements and performing at peak efficiency." The Board also held, after defining "criminal investigation" as "investigation of suspected or known criminals for the immediate purpose of criminally prosecuting them if warranted", that criminal investigations "involve unusual physical hazards for the investigator, deriving from frequent contacts with criminals and suspected criminals, and their desire to avoid prosecution." *Id.* at 633. It declined, however, to find that the existence or degree of hazards was in itself an appropriate factor in determining LEO status. *Id.* The deletion in 1974 of language in 5 U.S.C. § 8336(c) that had previously required consideration of the degree of hazard the employee was subjected to supports the Board's conclusion. *See Obremski v. Office of Personnel Management*, 699 F.2d 1263, 1272 n.31 (D.C.Cir.1983); Subsec. (c), P.L. 93-350. The Board instead found that the hazards inherent in frontline LEO duties were to be considered along with other factors, such as working for long stretches of time without a break, being on

call 24 hours a day, and/or carrying weapons, in determining whether a position involved rigorous working conditions that required the unusual physical stamina and vigor characteristic of criminal investigations. *Hobbs*, 58 M.S.P.R. at 633. The employee in *Hobbs* was denied LEO credit because his "noncriminal investigative duties did not require unusual physical stamina or vigor . . .", not because there was no unusual danger to his job. More specifically, without any reference to the element of danger, the Board found that he "was not required to maintain a level of physical fitness, work overtime frequently, be on call 24 hours a day, carry a weapon or maintain proficiency in the use of a weapon, or give Miranda warnings . . ." and did not "generally have contacts with suspected or known criminals." *Id.* at 633 n.5. The Board's decision in *Hobbs*, I find, fails to support the agency's contention that danger is the *sine qua non* of LEO credit. Board decisions since *Hobbs* also fail to support the agency's position.

In *Sauser v. Office of Personnel Management*, 59 M.S.P.R. 489, 493 (1993), "unusual physical hazards" is listed as only one of the many factors to be considered in determining whether an employee's duties primarily involved criminal investigations. Similarly, the employee in *Ferrier v. Office of Personnel Management*, 60 M.S.P.R. 342, 348 n.5 (1994), was found to be entitled to LEO service credit because his investigations, unlike those of the appellant in *Hobbs*, resulted in criminal prosecutions, not just because elements of danger were present in his job. In addition, on reconsideration of its *Ferrier* decision the Board again listed "unusual physical hazards" as only one of the factors to be considered and emphasized the presence of "rigorous physical demands" not just the element of danger. *Ferrier v. Office of Personnel Management*, 66 M.S.P.R. 241, 244 and 248 (1995). Finally, in its most recent LEO decisions the Board has again found that the existence or degree of hazard is to be considered only to the extent it reflects on the

physical stamina and vigor required in a position and that the other factors identified in *Hobbs* are also relevant to that issue. *See Taylor v. Department of the Treasury,* 68 M.S.P.R. 693, 698 (1995). The hazardous nature of the work, unusual physical demands, and all other and "traditional indicia of LEO status" are to be considered. *See Killion v. Department of the Treasury,* MSPB Docket No. BN-0831-96-0006-I-1 (Sept. 16, 1996). Unusual physical exertion and hazards are criteria to be used in determining whether an employee's duties are related to criminal investigations; they do not constitute independent factors that by themselves establish LEO status. *See Taylor v. Department of the Treasury,* 72 M.S.P.R. 327, 330-31 (1996), *review denied,* 106 F.3d 427 (Fed.Cir.1997) (Table). Contrary to the agency's contention, unusual physical danger or hazard is not an essential element and the *sine qua non* of entitlement to LEO credit.

To be entitled to LEO service credit under CSRS, appellant Hannon and appellant Townsend, for that period of his service as a DI preceding his conversion to FERS, must therefore establish that on consideration of all of the relevant factors and traditional indicia of LEO status their primary duties were the criminal investigation of individuals suspected or convicted of offenses against the criminal laws of the United States. Under 5 C.F.R. § 831.902 primary duties are duties of a position that:

> (1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;
>
> (ii) Occupy a substantial portion of the individual's working time over a typical work cycle; and
>
> (iii) Are assigned on a regular and recurring basis.
>
> (2) Duties that are of an emergency, incidental, or temporary nature cannot be considered "primary" even if they meet the substantial portion of time criterion. In general, if an employee spends an average of at least 50

percent of his or her time performing a duty or group of duties, they are his or her primary duties.

FERS

The first part of the FERS definition of law enforcement officer, set forth at 5 U.S.C. § 8401(17)(A)(i), is identical to the CSRS definition, that is, an employee the duties of whose position are primarily "the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States". In addition, however, the statute specifies that those duties must be "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency." 5 U.S.C. § 8401(17)(A)(ii). OPM regulations at 5 C.F.R. § 842.802 restate the statutory definition of "law enforcement officer" and provide the same definition of "primary duties", set forth above, that is found in the CSRS regulations. These regulations, however, also provide the following definition of "rigorous position";

> Rigorous position means a position the duties of which are so rigorous that employment opportunities should, as soon as reasonably possible, be limited (through establishment of maximum entry age and physical qualifications) to young and physically vigorous individuals.

On its face the FERS definition appears to simply codify the "unusual physical stamina and vigor" characteristic that the Board, in *Hobbs*, found in the legislative history of the CSRS LEO provisions. However, both appellant and the agency acknowledge that Congress intended the FERS definition to be more restrictive and to exclude positions which are not physically demanding, and expected fewer positions to meet the definition. S. Rep. No. 99-166, 99th Cong. 2. Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 1495,

1446. The FERS and CSRS standards for LEO service credit thus cannot be identical.

In this regard, it is relevant to note that in *Hobbs*, 58 M.S.P.R. at 633, the Board found that the unusual physical hazards involved in criminal investigations "[derived] from frequent contacts with criminals and suspected criminals, and their desire to avoid criminal prosecution." In *Peek v. Office of Personnel Management*, 63 M.S.P.R. 430, 433-34 (1994), *aff'd*, 59 F.3d 181 (Fed.Cir.1995) (Table), the Board denied a request for attorney fees because the agency had reasonably relied on "the Board's own precedent regarding the importance of direct contact with criminals or suspected criminals as a factor in determining law enforcement status. . . ." The legislative history of the FERS definition, however, reveals a determination that, "Frequent contact with criminals is an insufficient reason for a position to be defined as a law enforcement position." S. Rep. No. 99-166, 99th Cong. 2. Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 1495, 1446. Direct and frequent contact with criminals is not by itself, I conclude, sufficient to establish that a position is rigorous under the FERS standard. More specific evidence concerning the nature of those contacts or any other evidence showing that the duties of a position are physically demanding and that the position should be limited to young and physically vigorous individuals is required. There is no requirement under FERS, however, that LEO duties by hazardous or dangerous. As the Board found in *Hobbs* in its analysis of the CSRS standard, the hazards inherent in the duties of a particular position would simply be one factor to be considered in determining whether that position involved rigorous working conditions that satisfied the FERS standard.

DEA's Diversion Program

While the agency obviously takes the position that the duties performed by appellants do not satisfy the specific LEO requirements under CSRS and FERS, it is well

established by documentary evidence and the testimony of essentially every witness who appeared that as a general matter the DEA's Diversion Program and its DI's have regularly been involved in criminal investigations. Studies of the Diversion Program conducted in 1983 and 1990 (App. Exs. A and B); agent and investigator manuals (App. Exs. HH-KK; Ag. Exs. 1-3); the testimony of DEA officials who have administered the program (Henry Wankel—Director of Operations, Gene R. Haislip—Deputy Assistant Administrator, Terrence M. Burke—former Acting Administrator an Deputy Administrator; Ronald Buzzeo, former Deputy Chief of Office of Diversion); the testimony of local police officers and an Assistant United States Attorney (AUSA) who worked on some of the investigations (Edward Rodek, George Piazza, William Joyce, and Albert E. McLean); and the testimony of appellants and other DI's and DEA Special Agents (John Coleman, Carl Eckman, Byron Hoekstra, Joel Fries, Wayne Bohrer, Jude McKenna, Dale Shick, John Crowley, Harold Mosher, Larry Snyder, Martin London, Steven Bushendorf, and Edward Scheid) confirm that the Diversion Program, as part of its mission, has had its DI's conduct investigations for the purpose of prosecuting and convicting individuals and organizations (doctors and pharmacists) involved in the illegal diversion of legal drugs (pharmaceuticals) and precursor chemicals and thus violation of criminal drug laws.

The agency nevertheless maintains that DI's have been prohibited from making arrests, executing search warrants, going undercover, directing, controlling or paying informants, or conducting moving surveillances. For this reason and because it contends that DI duties are not dangerous, do not involve unusual physical hazards, and are not limited to young and physically vigorous individuals, the agency argues that appellants have not been involved in criminal investigations within the meaning of the CSRS and FERS LEO provisions. It also asserts that appellants have failed to

establish that any criminal investigative work they did perform was a primary duty.

As the Board cautioned in *Sauser*, 59 M.S.P.R. at 493, the issue is not whether DI positions in general are law enforcement positions but whether appellants Hannon and Townsend primarily performed law enforcement duties in their actual work as DI's. For the following reasons I find that appellants have established that the actual primary DI duties they performed were covered LEO duties. The evidence documenting the overall mission and accomplishments of the Diversion Program with respect to criminal investigations provide additional support for this finding.

Appellants' primary duties were the investigation of individuals suspected or convicted of criminal offenses against criminal laws of the United States

APPELLANT HANNON

Appellant seeks "primary time" LEO credit for his work as a DI in DEA's Chicago office between July 27, 1972 and March 18, 1978. In a 1983 paper, "The Role of the 1810 Investigator in DEA (1972 to Present)", Mr. Haislip set forth a chronological and historical overview of the Diversion Program. (H-Ag. File, Tab 2II-13). He therein explained that a specialized work force, the GS-1810 investigators, was created soon after the implementation of the Controlled Substances Act in 1971, that 1810 investigators and GS-1811 special agents initially worked together, and that as early as 1972 a number of 1810 investigators were conducting criminal investigations. *Id.* Mr. Haislip also reported that, "Some of the investigations of violations of federal law consumed a major part, and in some cases all, of the investigator's time". In certain geographic areas 1810 investigators devoted significantly more time to criminal investigations than the "program norm during those early years" and 1810 investigators were called upon to fill the

need for investigation of criminal violations. *Id.* A somewhat contradictory position on the role of the DI between 1971 and 1979 was adopted by Mr. Haislip during the hearing. In his testimony he thus stated that during these years there were only occasional criminal investigations and the DI's primary focus was on regulatory compliance. Mr. Haislip, however, did not disavow the position expressed in the 1983 paper that criminal investigations were conducted, that some consumed all of an investigator's time, and that some offices devoted more time than others to criminal investigations. Appellant's claim that he was working on criminal cases as early as 1972 is not disproved by Mr. Haislip's testimony and finds general support in the historical account of the Diversion Program provided in the 1983 paper.

More specifically, appellant and his supervisor at the time he arrived in Chicago in 1972, Mr. Eckman, testified that because of appellant's prior experience he and another investigator were assigned all of the complaint/criminal cases that remained when the special agents stopped doing diversion work and in addition initiated their own criminal diversion investigations. Appellant testified in great detail to the specific investigative tasks he performed throughout this entire 1972 to 1978 period. According to appellant he conducted surveillances of suspect doctors' and pharmacists' places of business; interviewed patients and customers of the suspects and the suspects themselves, giving Miranda warnings when necessary; attempted consensual telephone calls between a cooperating individual and a suspect to obtain incriminating evidence; obtained and exécuted administrative inspection warrants; served as an affiant to obtain search warrants and then participated in searches; analyzed records as possible evidence; carried out controlled deliveries of marked drug shipments; issued administrative subpoenas for telephone records and obtained judicial subpoenas for handwriting exemplars; monitored and recorded undercover buys

from nearby cars; and testified before grand juries and at trials in federal and state courts.

That appellant engaged in these activities is confirmed by the testimony of Mr. Eckman, who supervised him in 1972 and 1973 and worked with him on some of his criminal cases, and by the testimony of Sgt. Rodek of the Illinois State Police, who worked with appellant on a number of criminal investigations between 1972 and 1975. The testimony of appellant, Eckman, and Rodek, and the files for some of the cases handled by appellant during this time (Ag. Exs. 4-8) also firmly establish that these investigative techniques were all used for the purpose of obtaining criminal prosecutions and convictions. Moreover, the Board has found that investigative duties of this nature are sufficient to establish that an employee is performing criminal investigations. *See Taylor,* 72 M.S.P.R. at 330; *Taylor,* 68 M.S.P.R. at 696-97. In this regard I do not find controlling the agency directives that prohibit DI's from carrying weapons, making undercover purchases, controlling and paying confidential informants,[5] making arrests and executing search warrants, and conducting surveillances.[6] (Ag. Ex. 2; App. Exs. C and D). That appellant was unable to perform these investigative duties does not diminish the significance of those that were part of his job and that show that he was involved in criminal investigations. However, because they arguably are relevant to the degree of danger faced by DI's, these restrictions must be considered in determining whether appellant's duties

---

[5] This prohibition covers the controlling and paying of confidential informants. DI's may interview sources of information and assist in debriefing of established informants. (Ag. Ex. 2).

[6] The prohibition on moving surveillances was imposed in 1977. (App. Ex. C). In 1984 it was extended to stationary surveillances. (App. Ex. D). DI's may, however, sit outside a doctor's office or pharmacy and observe traffic going in and out and may ride along with Special Agents or state or local police on a moving surveillance. (Testimony of Mr. Wankel).

involved rigorous working conditions that required the unusual physical stamina and vigor characteristic of criminal investigations.

The agency's contention that appellant was not required to do anything dangerous and that his duties only involved the review of documents and visits to pharmacies and doctors' offices during normal business hours is contradicted by the record evidence and disingenuously ignores a contrary position taken by the agency on other occasions. The agency thus recognized in a 1974 manual that DI's may encounter hostility at narcotic treatment facilities that are located in high crime areas. (App. Ex. HH). In a 1988 memorandum recommending that DI's be included in legislation that would have amended the retirement law with respect to employees in certain hazardous occupations the agency commented on the stressful and hazardous work of DI's at narcotic treatment programs, the emotional reaction of doctors and pharmacists when confronted with evidence of violations of law, and the stressful and hazardous situations faced by DI's in dealing with "patients" of the medical professionals because these "patients" are drug users and pushers whose behavior is unpredictable. (App. Ex. M). In a 1990 request for certain communications equipment the agency explained that DI's are exposed to situations which have a potential for harm such as:

> . . . investigations of narcotic treatment facilities or registrants located in high crime areas, prescription verifications with alleged patients, confronting suspected registrant diverters, unannounced inspections of a chemical supplier who may be operating as a front for a clandestine laboratory, or merely traveling in remote and isolated areas.

(App. Ex. J). The 1983 study of the Diversion Program cited above also addresses the "inherent danger in an 1810's job". (App. Ex. A).

The agency's current effort to minimize the significance of what it now refers to as only the "potential" for danger and to contend that appellant's position was not hazardous because there were no documented situations in which he was in actual danger is lacking in logic and is contradicted by the evidence noted above emphasizing the extent and significance of the potential for harm faced by DI's. More important, the testimony of appellant Hannon, Mr. Eckman, and Sgt. Rodek establishes that appellant, during the years at issue, did locate and interview witnesses after hours and after dark at some of Chicago's worst crime areas where police officers had been shot and that suspects in some of his investigations kept weapons in their offices or had armed guards. Sgt. Rodek also observed that some suspects were addicts themselves or mentally unstable and therefore presented additional risks to appellant.

Finally, record evidence concerning physical standards for DI's confirms that DI positions in general and appellant's position between 1972 and 1978 involved unusual physical exertion and hazards. Formal physical standards adopted in 1989 thus specify that DI duties entail long and irregular hours, interaction with hostile or abusive registrants, and arduous physical exertions under a variety of environmental conditions. (App. Ex. G). It was the testimony of Mr. Burke that he had thought the physical standards had been in place since the inception of the Diversion Program in 1971 but was told that they had never been finalized. Appellant recalled that he was required to take a medical examination before he was hired in 1972. Jean D. Mathis, Assistant Administrator for Human Resources, also testified that physical requirements did exist for DI positions and that they had existed since she began working for DEA in 1975. (App. Ex. LLL). The existence of these physical standards when considered with the evidence of appellant's frequent contacts with criminals and suspected criminals and of the specific nature of the investigative duties he was performing establish that

his work as a DI involved rigorous working conditions that required unusual physical demands and vigor.

In reaching this conclusion I have considered the evidence showing that appellant was not on call 24 hours a day and that he did not work extensive amount of overtime. Appellant in fact does not contend that he was on call at all times. In addition, Mr. Eckman testified that appellant worked overtime two to three nights a week and appellant recalled that on average he worked late three or four hours a week. Were this the only evidence bearing on this issue the record would likely not support a finding that appellant's position involved rigorous working conditions. However, in view of the other evidence outlined above concerning the nature of appellant's duties, the agency's physical standard, the hazards of the position, and appellant's testimony that he did work long stretches without a break, stand for long periods while conducting stationary surveillances, and on dozens of occasions was called into work after hours, I find that appellant has established that he was engaged in criminal investigations.

In addition, appellant has established that the duties he performed in carrying out his criminal investigations were the primary duties of his DI position under 5 C.F.R. § 831.902. The GS-1810-11 position description (PD) for the position held by appellant emphasizes regulatory investigations and only lists support of the criminal investigative program as the last of a number of major duties. (H-Ag. File, Tab 2II-4). No reference at all to criminal investigation appears in appellant's GS-1810-12 PD. *Id.* These PD's, however, do not overcome the other evidence that establishes that in the Chicago office, between 1972 and 1978, appellant Hannon was performing criminal investigative duties over 50 percent

of the time.[7] First it is apparent that the GS-12 PD could not be accurate inasmuch as it is undisputed that appellant did conduct criminal investigations during this time. In addition, as already note above, Mr. Haislip's 1983 paper reported that as early as 1972 some criminal investigations consumed all of an investigator's time and that investigators in certain geographic areas devoted more time than the "program norm" to such investigations. In this regard Mr. Buzzeo and Mr. Haislip testified that the Chicago office was always considered very active in criminal investigations. (See also H-Ag. File, Tab 2II-8). This evidence is thus consistent with and provides general support for appellant's testimony that he spent 80 percent of his time on criminal investigations in 1972 and 1973 and that during the entire time for which he is seeking primary LEO credit he spent 60-65 percent of his time on criminal diversion cases. The credibility of appellant is also supported by the corroborating testimony of Mr. Eckman to the effect that appellant regularly spent 70 percent and sometimes 100 percent of his time on criminal investigations. In addition, while Sgt. Rodek did not provide a numerical estimate, he did identify specific criminal cases that he worked on with appellant and related that between 1972 and 1975 he and appellant worked together on a regular basis. All of the above evidence along with appellant's testimony concerning the criminal cases he listed in his LEO application and the more than forty other criminal cases that he was able to identify at the time of the hearing is sufficient to establish that his primary duties did involve criminal investigations.

---

[7] It was the testimony of Mr. Buzzeo and the position he expressed in a 1990 letter to the Office of Personnel Management that the agency during this period of time refused to include law enforcement experience in PD's even though the 1810 workforce was substantially involved in criminal investigations. (App. Ex. O).

In reaching this conclusion I have considered but found no merit to the agency's contention that appellant's primary duties could not have involved criminal investigations because the criminal diversion cases that he identified in his LEO request could not have taken a majority of his time. There is simply no indication in that request that these cases alone were supposed to have taken up the more than 50 percent of his time that appellant now claims in his testimony. Moreover, in his testimony appellant identified by name numerous other criminal cases in which he performed the investigative duties detailed above. In addition it is of no demonstrated significance that the files for the cases identified by appellant in his LEO request do not document all of the investigative activities, duties, and techniques performed by appellant. The agency did not establish that the files in the record (Ag. Exs. 4-9) are complete or that they would in any event have to capture all of appellant's activities.

I also find unpersuasive the testimony of Martin London and Steven Bushendorf, Chiefs of Compliance during the time in question, that appellant's primary duties did not involve criminal investigations. While Mr. London stated that non-criminal regulatory investigations represented 50 to 60 percent of the office's work he admitted that appellant, as the senior investigator, spent more time than the other employees on criminal investigations. He also stated that any one employee could have spent more than 50 percent of his time on criminal investigations, that he did not recall the specific cases that appellant worked on, but that he would be surprised if appellant spent much over 50 percent of his time on criminal investigations. The testimony of Mr. London certainly does not rebut the evidence supporting appellant's claim. I reach the same conclusion with regard to the testimony of Mr. Bushendorf that appellant spent only 20 percent of his time on criminal cases. While claiming that he based this opinion on his review over twenty years ago of

appellant's time sheets, those sheets are not part of the record. In addition, Mr. Bushendorf was not appellant's direct supervisor and was unable to recall specifically what appellant did.

APPELLANT TOWNSEND

Appellant Townsend was hired on February 16, 1986, as a GS-1810-7, DI. He worked in the Washington District Office for six weeks and then transferred to Pittsburgh and helped open DEA's Diversion Program in that office. He was promoted to the GS-11 and GS-12 levels in Pittsburgh and then on July 1, 1991, he was promoted to the GS-13 position of Diversion Group Supervisor in Boston. Appellant seeks LEO service credit for primary time under CSRS between his date of hire until January 1, 1987, and for primary time under FERS between January 1, 1987, and July 1, 1991. In its June 29, 1995, decision the agency denied appellant's request for primary credit under CSRS and FERS for the same reasons that it denied appellant Hannon's request, the claimed failure to establish that he performed rigorous, hazardous, and physically demanding duties. (T-Ag. File, Tab 1). While appellant's PD's for his positions in Pittsburgh either do not mention criminal investigations or, at the GS-12 level, only refer to supportive efforts that aid in possible criminal prosecutions, the evidence is overwhelming that he did, from the very beginning, conduct criminal investigations. (Ag. Ex. 26). I reach this conclusion on the basis of the evidence discussed in appellant Hannon's case that documents the recognition by agency officials that criminal investigations were being conducted in the Diversion Program, the related testimony of Mr. Buzzeo[8] and Mr. Haislip, and more important, the uncontradicted testimony of appellant, his supervisors, and other law enforcement officials who worked

[8] Mr. Buzzeo testified that when he left in 1990 the Diversion Program was devoting 60 percent of its time to criminal investigations.

with him in Pittsburgh. In view of this evidence and Mr. Buzzeo's testimony the agency would not allow PD's to reflect the criminal investigative work that was being performed, little if any weight can be given to appellant's PD's.

The testimony of appellant's supervisor, Dale Shick, that appellant spent 80 percent of his time on criminal investigations, written statements and documentation from Shick and other supervisors concerning this investigative activity (T-Ag. File, Tabs 2O, 2Q, and 2S; T-Ag. File, Vol. II—Tab 9), appellant's own activity reports (App. Exs. PP-UU), and appellant's detailed testimony of his activities in specific cases establish that these investigations occupied most of his time and did constitute his primary duties.

The testimony of appellant, Shick, AUSA McLean, William Joyce (a detective with the Pittsburgh Police Department), and Jude McKenna (a DEA Special Agent who worked with appellant) also establish that appellant performed the same investigative tasks as appellant Hannon,[9] was exposed to the same hazards and dangers because of the areas in which he worked, the drug related activities of the individuals with whom he was dealing, and the fact that many of the suspects kept weapons in their places of business. AUSA McLean and Commander Joyce corroborated appellant's testimony that the "patients" of the doctors and pharmacists under investigation were often drug addicts and dealers and suspected criminals. Commander Joyce, Mr. McKenna, Mr. Shick, and AUSA McLean also described investigative activities of appellant in these crimnal cases that required him to work long and unpredictable hours. Mr.

---

[9] Appropriate surveillances, searches and seizures by administrative or criminal warrants, interviews of witnesses and suspects, administration of Miranda warnings, directing and monitoring undercover operations, drafting of affidavits for search warrants, service of grand jury subpoenas, and testimony before the grand jury and in court.

Shick, in addition, corroborated appellant's testimony that the agency did not record overtime on the DI's timesheets and that on one of the tasks forces involving a criminal investigation appellant carried a beeper so that he could be reached at any time. The testimony of these numerous witnesses who worked closely with appellant is more credible, I find, than the testimony of Edward Scheid, a DEA Special Agent who worked in Pittsburgh during the time appellant was there. In Mr. Scheid's view the DI's were not exposed to any danger and their most important work was the review of documents Mr. Scheid, however, also stated that only ten percent of his time was spent on diversion cases, that between 1986 and 1991 he was out of the office most of the time, that he only worked with appellant on a few cases, and that he was unaware of appellant's other cases.

While appellant was subject to the agency restrictions that prevented all DI's from carrying a weapon, executing arrests or search warrants, working undercover, conducting surveillances, or developing or paying confidential informants, the evidence discussed above establishes, as it did in appellant Hannon's case, that appellant's primary duties were the investigation of individuals suspected or convicted of criminal offenses against criminal laws of the United States for the immediate purpose of prosecuting them. This same evidence, which details appellant's frequent contact with criminals or suspected criminals, the hazardous nature of his work, and the long and unpredictable hours that he worked, the evidence discussed above concerning the physical medical standards for DI's, and appellant's testimony that his medical package had to be approved before he was hired as a DI also establish that his position involved rigorous working conditions that satisfy both the CSRS and FERS standards. Although not dispositive of appellant's claim inasmuch as credit for LEO service must be based on the demonstrated duties of each employee, it is relevant to

note that Mr. Shick, who worked as a DI with appellant between 1987 and 1989 was awarded primary LEO credit by OPM.

Appellants are entitled to "secondary" LEO service credit

An employee who transfers directly from a "primary" LEO position can qualify for LEO retirement credit in a "secondary" LEO position as a supervisor or administrator. 5 C.F.R. §§ 831.904(a) and 842.803(b)(i). FERS employees must have first spent three years in a "primary" position. 5 U.S.C. § 8401(17); 5 C.F.R. § 842.803(b)(ii).

Under CSRS a secondary position is one which is clearly in the law enforcement field in an organization having a law enforcement mission and is either:

> Supervisory: i.e., a position whose primary duties are as a first level supervisor of law enforcement officers or firefighters in primary positions; or
>
> Administrative; i.e., an executive, managerial, technical, semiprofessional, or professional position for which experience in a primary law enforcement or firefighting position, or equivalent experience outside the Federal government, is a prerequisite.

5 C.F.R. § 831.902. The same requirements apply under FERS but the primary positions supervised incorporate the statutory definition of "rigorous" and, for secondary administrative positions, the prior LEO experience must be a "mandatory prerequisite". 5 C.F.R. § 842.802.

In its decision denying LEO credit to appellant's Hannon and Townsend the agency simply found that they had not shown that they transferred to a secondary position directly from a primary position. Having now concluded that both appellants have established that they are entitled to primary LEO credit, it is necessary to determine whether they meet the requirements for secondary coverage.

APPELLANT HANNON

Appellant seeks LEO secondary/supervisory credit for his position as Group Supervisor in Chicago from March 19, 1978, to February 7, 1988. His testimony and that of DI's that he supervised (Byron Hoekstra and Joel Fries), a Chicago policy officer who worked with appellant during this time (George Piazza), and his own supervisor (John Coleman) establish that appellant was supervising DI's engaged in the same type of criminal investigations that he himself had previously conducted. This same evidence, which stands uncontradicted, also shows that these investigations constituted substantially more than 50 percent of the office's work and involved the same physical hazards and rigorous working conditions described in detail in the discussion of appellant's DI duties. Appellant, I conclude, has established that his primary duties as Group Supervisor were the first level supervision of DI's performing LEO work in primary positions. This conclusion is also supported by the evidence establishing that DI's Hoekstra and Fries have been awarded LEO credit by OPM for the work they performed under appellant. (App. Exs. CC, DD, EE).

Appellant also requests LEO secondary/administrative time for the positions of Staff Coordinator in the Office of Diversion, DI in the Hazardous Waste Unit, Security Specialist in the Office of Diversion, and Inspector in the Office of Inspections. The unrebutted testimony and statements of the supervisors of these positions and of Mr. Buzzeo and Mr. Haislip, who recommended appellant's selections, establish that in each instance appellant's experience in primary criminal diversion investigations was essential to and a prerequisite for his selection. (Testimony of Haislip, Special Agent Sidney Hayakawa, Buzzeo; Statements of Wayne Bohrer, Hayakawa, Buzzeo and Haislip, H-Ag. File, Tabs 2C, 2X-11, 12, and 13, App. Ex. S). Appellant has established his entitlement to the requested LEO secondary time.

APPELLANT TOWNSEND

Appellant Townsend seeks credit for secondary supervisory time for his service in the position of Group Supervisor in Boston and for secondary administrative time for his work in the position of Staff Coordinator in DEA headquarters. With regard to the supervisory position, his own testimony and that of Jack Crowley, who held the position immediately before and after him, and of Harold Mosher, a DI in Boston, establish that appellant was supervising DI's in rigorous positions who spent well over 50 percent of their time conducting criminal investigations that included all of the characteristics identified in the discussion of Hannon's and Townsend's primary duties. It is relevant to note that Mr. Mosher has been awarded LEO primary credit for his service as a DI in Boston between 1985 and 1991. (App. Ex. CCC).

The record also establishes that appellant is entitled to secondary/administrative time for his service in the Staff Coordinator position. The vacancy announcement for the position and the testimony and written statement of Mr. Haislip show that LEO experience in criminal investigations was a prerequisite for selection. (App. Exs. U, XX, VV, and WW. Moreover, Mr. Crowley, was awarded secondary/administrative credit for his service in this same position. (App. Exs. AAA and BBB).

DECISION

The agency's decisions with respect to appellants Hannon and Townsend are REVERSED. The appeals of the other appellants (Carter, Walkup, Gitchell, Peterson, Hartman, Tillman, and Galvin) are dismissed without prejudice to their right to refile under the terms of the consolidation order or in accordance with any directions provided by the Board in any subsequent decision.

ORDER

The agency is ORDERED to grant appellants Hannon and Townsend law enforcement credit for the period specified in this decision. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is further ORDERED to inform appellants in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

Although appellants are the prevailing party, I have determined not to order interim relief pursuant to 5 U.S.C. { 7701(b)(2)(A), for the following reasons. Because of the consolidation order in this case and the large number of other LEO cases pending with the agency, further review of this decision and the legal standards for LEO service credit that it has applied will almost certainly be sought. In addition, actions of both the agency and appellant based on interim approval of LEO service credit would likely have to be cancelled should this decision be reversed by the Board. Under these circumstances I find that interim relief is not appropriate.

FOR THE BOARD: William C. Jenkins
Administrative
JudgeNOTICE TO

PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. { 1201.112(a)(5).

NOTICE TO APPELLANTS

This initial decision will become final on *June 4, 1997*, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already parat of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees and costs by filing a motion with this office no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 U.S.C. {{ 7701(g) and 1221(g), 5 C.F.R. { 1201.203, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

Supreme Court, U.S.
FILED
NOV 5 2001

No. 01-372

In the Supreme Court of the United States

JAMES T. HANNON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
SCOTT D. AUSTIN
MICHAEL F. KIELY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly upheld the determination of the Merit Systems Protection Board that petitioners are not "law enforcement officers" within the meaning of the civil service retirement statutes, 5 U.S.C. 8331(20), 8401(17).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Bingaman v. *Department of Treasury*, 127 F.3d 1431 (Fed. Cir. 1997)	4, 8, 9
Ferrier v. *Office of Personnel Management*, 66 M.S.P.B. 241 (1995)	8
Hobbs v. *Office of Personnel Management*, 58 M.S.P.B. 628 (1993)	8, 9
Lorillard Tobacco Co. v. *Reilly*, 121 S. Ct. 2404 (2001)	8
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	8- 9
Obremski v. *Office of Personnel Management*, 699 F.2d 1263 (D.C. Cir. 1983)	10
United States v. *United Foods, Inc.*, 121 S. Ct. 2334 (2001)	8
Watson v. *Department of the Navy*, 86 M.S.P.B. 318, aff'd, 262 F.3d 1292 (Fed. Cir. 2001)	11, 12

Statutes and regulations:

Controlled Substance Act, 21 U.S.C. 801 *et seq.*	5
5 U.S.C. 7703(c)	8
5 U.S.C. 8331(20)	3, 6
5 U.S.C. 8334(a)	2
5 U.S.C. 8334(c)	2
5 U.S.C. 8335(b)	2
5 U.S.C. 8336(a)	2
5 U.S.C. 8336(b)	2

Statutes and regulations—Continued: Page

5 U.S.C. 8336(c)(1) 2
5 U.S.C. 8347(a) 4
5 U.S.C. 8401(17) 3
5 U.S.C. 8401(17)(A)(ii) 10
5 U.S.C. 8412(a) 2
5 U.S.C. 8412(b) 2
5 U.S.C. 8412(d) 2
5 U.S.C. 8412(d)(2) 2
5 U.S.C. 8425 2
5 U.S.C. 8461(b) 4
5 C.F.R.:
Section 831.901 2
Section 831.902 4
Sections 831.903-831.906 2
Section 831.906(a) 3
Section 831.907 2
Section 831.908 2
Section 842.802 ..... 4, 11
Sections 842.803-842.804 2
Section 842.807(a) 2
Section 1201.56(a)(2) 3

Miscellaneous:

119 Cong. Rec. 30,596 (1973) 10, 11
S. Rep. No. 948, 93d Cong., 2d Sess. (1974) 9

In the Supreme Court of the United States

No. 01-372

JAMES T. HANNON, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Hannon* v. *Department of Justice* (Pet. App. 1a-14a) is reported at 234 F.3d 674. The opinion of the Merit Systems Protection Board (MSPB or Board) (Pet. App. 18a-33a) is reported at 82 M.S.P.B. 315. The opinion of the administrative judge (Pet. App. 42a-73a) is unreported.

The opinion of the court of appeals in *Townsend* v. *Department of Justice* (Pet. App. 16a) is unreported. The opinion of the MSPB (Pet. App. 34a-41a) is reported at 83 M.S.P.B. 427. The opinion of the administrative judge (Pet. App. 42a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Hannon* was entered on December 7, 2000. The judgment of the

court of appeals in *Townsend* (Pet. App. 16a) was entered on January 11, 2001. Petitions for rehearing were denied in both cases on May 1, 2001 (Pet. App. 14a-15a, 17a). On July 20, 2001, Chief Justice Rehnquist granted petitioners' application to extend the time within which to file the petition for a writ of certiorari to and including August 29, 2001, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal employees who qualify as a "law enforcement officer" (LEO) under the Civil Service Retirement System (CSRS), 5 U.S.C. 8336(c)(1), or the Federal Employees Retirement System (FERS), 5 U.S.C. 8412(d), enjoy special retirement benefits. An LEO may retire upon attaining the age of 50 and completing 20 years of LEO service. 5 U.S.C. 8336(c)(1), 8412(d)(2). In contrast, most other civil service employees are not eligible to retire until they reach the age of 60 and have 20 years of service, or reach the age of 55 with 30 years of service. 5 U.S.C. 8336(a) and (b), 8412(a) and (b). An LEO also is entitled to a larger retirement annuity than other civil service employees (though an LEO is also subject to larger salary deductions during his federal employment), and may qualify for mandatory early retirement. 5 U.S.C. 8334(a) and (c), 8335(b), 8425; 5 C.F.R. 831.901, 831.907, 831.908.

An employee may qualify for LEO retirement credit in one of two ways: (1) by serving in a position that is formally designated as an LEO position; or (2), if the employee does not occupy such a position, by asking his employer to recognize that he nonetheless qualifies for LEO status. 5 C.F.R. 831.903-831.906, 842.803-842.804, 842.807(a). An employee who applies for LEO retire-

ment credit bears the burden of proving that he qualifies as an LEO under either the CSRS or the FERS. 5 C.F.R. 831.906(a), 1201.56(a)(2).

The CSRS defines an LEO as

> an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

5 U.S.C. 8331(20). The FERS defines an LEO as

> (A) an employee, the duties of whose position—
>
> (i) are primarily—
>
> (I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or
>
> (II) the protection of officials of the United States against threats to personal safety; and
>
> (ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

5 U.S.C. 8401(17).

The Office of Personnel Management (OPM) has promulgated regulations further explicating the foregoing definitions. 5 U.S.C. 8347(a), 8461(b). The regulations specify that an LEO "does *not* include an employee whose primary duties involve maintaining law and order, protecting life and property, guarding against or inspecting for violations of law, or investigating persons *other than persons who are suspected or convicted of offenses against the criminal laws of the United States.*" 5 C.F.R. 831.902, 842.802 (emphasis added). The regulations further specify that the "rigorous" requirement of the FERS is met if the duties of a position "are so rigorous that employment opportunities should, as soon as reasonably possible, be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

In addition, the MSPB—which adjudicates disputes over whether employees qualify for LEO retirement credit—has extrapolated from the statutes and regulations various factors that it has determined illuminate the inquiry whether an employee meets the definition of an LEO. As the Federal Circuit has explained:

> According to the Board, [an LEO] within the statutory contemplation commonly (1) has frequent direct contact with criminal suspects; (2) is authorized to carry a firearm; (3) interrogates witnesses and suspects, giving *Miranda* warnings when appropriate; (4) works for long periods without a break; (5) is on call 24 hours a day; and (6) is required to maintain a level of physical fitness.

Bingaman v. *Department of Treasury*, 127 F.3d 1431, 1436 (Fed. Cir. 1997); see Pet. App. 7a-8a. The Board also "consistently has recognized * * * that hazard is a significant element of law enforcement work." *Id.* at

8a (citing MSPB decisions). No single factor is "essential or dispositive," but together the factors capture what the Board has determined is "the essence of what Congress intended." *Id.* at 8a, 12a.

2. Petitioners served as diversion investigators for the Drug Enforcement Administration (DEA) within the United States Department of Justice. See Pet. App. 2a, 35a-36a. The work of a DEA diversion investigator involves inspections and audits of manufacturers and distributors of controlled substances to ensure that the products have not been diverted from legitimate distribution channels to illegal ones. *Id.* at 2a. The work also involves determining compliance with recordkeeping procedures, security safeguards, and other requirements of the Controlled Substance Act, 21 U.S.C. 801 *et seq.* Pet. App. 2a. Diversion investigators also participate in criminal investigations; however, under agency policy, they cannot carry firearms, make arrests, execute search warrants, make undercover purchases, control confidential informants, or conduct moving surveillance. *Ibid.*

The position of a DEA diversion investigator is not formally designated as an LEO position, but petitioners separately applied to the Department of Justice for enhanced retirement credit on the ground that they qualified as LEOs under the CSRS and FERS. In May and June of 1995, the Department of Justice issued final decisions that petitioners were not entitled to LEO retirement credit. Petitioners appealed those agency decisions to the MSPB and the Board consolidated their appeals. Pet. App. 42a-43a.

In 1997, an administrative judge issued an initial decision reversing the agency's finding in both cases. Pet. App. 42a-73a. The agency then sought review of that ruling before the full MSPB. On June 15, 1999, the

MSPB reversed the initial decision of the administrative judge in *Hannon*. *Id.* at 18a-33a. After considering the factors summarized in *Bingaman* (discussed above), the Board concluded that Hannon's "primary duties as a Diversion Investigator did not constitute the 'frontline law enforcement work,' entailing unusual physical demands and hazards, that is required for primary LEO service credit." *Id.* at 32a. Moreover, as the Board explained, Hannon "did not carry a firearm, did not have the authority to make arrests or execute search warrants, was not on call 24 hours a day, and was not required to maintain a significant level of physical fitness." *Ibid.*

On August 31, 1999, the MSPB reversed the administrative judge's initial decision in *Townsend*. Pet. App. 34a-41a. As in *Hannon*, after considering the factors commonly present with respect to LEOs who meet the statutory definition, the Board concluded that Townsend's primary duties did not constitute the "frontline law enforcement work, entailing unusual physical demands and hazards," that is indicative of LEO status. *Id.* at 40a.

3. The Federal Circuit affirmed the MSPB's decision in *Hannon*. Pet. App. 1a-13a. The court of appeals explained that it "review[s] the Board's ultimate determination whether a particular employee is a law enforcement officer under 5 U.S.C. § 8331(20) under an arbitrary and capricious standard," and declined to overturn the Board's finding that Hannon does not qualify as an LEO. *Id.* at 13a. The court explained that "Hannon's work fell somewhere between activities that had been held to be [LEO] work and those that had been held not to be so," and that ultimately the determination whether Hannon qualifies as an LEO boiled down to a "judgment call[]" for the MSPB. *Id.* at 12a,

13a. The court also reviewed the Board's determination under the *Bingaman* factors and found that "[f]our of the six indicia of [LEO] status specified in *Bingaman* are not present here." *Id.* at 4a; see *id.* at 4a-5a, 12a-13a. The court declined to consider the argument—raised by Hannon for the first time in his reply brief—that the MSPB has improperly grafted new requirements on the statutory definition of an LEO, stating that that argument came "too late." *Id.* at 10a.

Shortly thereafter, the Federal Circuit summarily affirmed the MSPB's decision in *Townsend*. Pet App. 16a.

ARGUMENT

The court of appeals properly upheld the MSPB's determination that petitioners do not qualify for LEO status under the CSRS or FERS. That determination is supported by substantial evidence, as well as reasonable administrative interpretations of the civil service retirement statutes. The court of appeals' decisions in these cases do not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners' central contention (Pet. 7) is that the court of appeals has "strayed from the plain language of the statute" in determining an employee's eligibility for LEO retirement credit. In particular, petitioners object to the court of appeals' consideration of the factors developed by the MSPB, and discussed in *Bingaman*, to assist the Board in determining whether the statutory definition is met. That contention is without merit and was not properly raised by Hannon.

The purpose of the *Bingaman* factors in adjudicating claims to LEO status is to assist the finder of fact in determining when the statutory definition is met, and

not to displace that definition. The Board "has extrapolated [those factors] from the statutory and regulatory language, in light of the legislative history," and has determined that they "capture[] the essence of what Congress intended." *Bingaman*, 127 F.3d at 1436; see *Hobbs* v. *Office of Personnel Management*, 58 M.S.P.B. 628, 631 (1993) (discussing legislative history); *Ferrier* v. *Office of Personnel Management*, 66 M.S.P.B. 241, 248-249 (1995). In determining whether an employee qualifies as an LEO, the touchstone remains whether the statutory definition of an LEO is met. See Pet. App. 20a-21a.

The Board's decision to consider certain factors in deciding whether the statutory definition is met is particularly appropriate when, as here, the Board is faced with a difficult judgment call as to whether a particular position qualifies for LEO status. See Pet. App. 12a. It cannot plausibly be argued that DEA diversion investigators are *plainly* LEOs within the meaning of the CSRS or FERS. Congress has given the Board broad authority to adjudicate personnel disputes within its jurisdiction; the Board's legal rulings are reviewable under the arbitrary and capricious standard. *Id.* at 13a; see 5 U.S.C. 7703(c). That scheme leaves the Board discretion to decide when, or under what circumstances, the statutory definition is met, and if it chooses to do so, to develop general guidelines to that effect.

In any event, Hannon failed to present this argument below. This Court generally does not consider arguments that were not pressed or decided below. See *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2420 (2001); *United States* v. *United Foods, Inc.*, 121 S. Ct. 2334, 2341 (2001); see also *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not

decide in the first instance issues not decided below."). In this case, Hannon waited until his reply brief to raise the argument that the statutory definition of LEO precludes the consideration of additional factors in determining whether that definition is met. The court of appeals held that that argument was waived, and did not reach it in *Hannon*. Pet. App. 10a. Townsend timely raised the argument, but the court of appeals affirmed without an opinion. *Id.* at 16a. Accordingly, the Court is without the benefit of any court of appeals' decision discussing petitioners' principal contention in this Court. The absence of such a decision provides a sufficient basis to deny review.

2. Petitioners claim (Pet. 12) that the legislative history of the civil service retirement statutes provides "no support" for the decisions below. That is incorrect. The legislative history indicates that Congress intended LEO positions to be occupied by "young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service." *Bingaman*, 127 F.3d at 1435 (quoting S. Rep. No. 948, 93d Cong., 2d Sess. 2 (1974)); see *Hobbs*, 58 M.S.P.B. at 631; Pet. App. 9a. At the same time, the interpretation urged by petitioners (Pet. 10)—that an employee may qualify as an LEO simply by demonstrating that he spends a majority of his time participating in criminal investigations, without regard to the nature of the activities performed in connection with those investigations—would extend LEO retirement benefits to a broad class of employees such as chemists, laboratory technicians, paralegals and secretaries in prosecutors' offices, and others who do not perform strenuous, frontline law enforcement duties. There is no evidence that Congress intended to include such employees

within the statutory definition of LEOs. Indeed, the FERS specifically provides that the duties of an LEO must be "sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals." 5 U.S.C. 8401(17)(A)(ii).

Petitioners suggest (Pet. 9) that the court of appeals erred in concluding that the MSPB did not abuse its discretion in considering the degree of hazard faced by petitioners as one of several factors in determining whether they met the statutory definition. The Board has recognized on multiple occasions that "the existence and degree of physical hazard is a factor to be considered in determining entitlement to LEO service credit." Pet. App. 22a (citing cases). And, as the Board has explained, consideration of that factor is supported by the legislative history of the civil service retirement statutes. *Id.* at 22a-23a. Moreover, the Board does not look to the degree of hazard posed by a position in isolation, but instead in conjunction with other factors. See *id.* at 23a ("Although * * * the existence or degree of hazards, in itself, may not be an appropriate factor to consider in determining an employee's LEO status, it is beyond cavil that the hazards inherent in frontline LEO duties, such as conducting criminal investigations, are precisely why physical stamina and vigor are necessary to overcome or minimize such hazards.").*

---

* Petitioners rely (Pet. 9) on *Obremski* v. *Office of Personnel Management*, 699 F.2d 1263, 1272 n.31 (D.C. Cir. 1983), in challenging the Board's consideration of the hazard posed by a position. The footnote cited by petitioners relies upon a portion of a floor speech made by Congressman Daniels, who stated that enhanced retirement benefits included in the 1974 Amendments were not a "reward" for performing hazardous duties. 119 Cong. Rec. 30,596 (1973). Daniels' statement emphasizes that the *reason*

Petitioners also assert (Pet. 12-13) that the court of appeals "erred in refusing to defer to OPM's regulations implementing the statute at issue." That is incorrect. Neither the Board's nor the court of appeals' decision in this case is inconsistent with the regulations implementing the civil service retirement statutes. To the contrary, as discussed above, the regulations provide that, to meet the FERS' definition of LEO, an employee's duties must be "so rigorous" that they should "be limited * * * to young and physically vigorous individuals." 5 C.F.R. 842.802.

3. Petitioners' disagreement (Pet. 13-16) with the Federal Circuit's subsequent decision in *Watson* v. *Department of the Navy*, 262 F.3d 1292, 1299 (2001), is misplaced and, in any event, provides no reason to review the decisions below. In *Watson*, the Federal Circuit affirmed the decision of the MSPB to place more "emphasis on the purpose of the [employee]'s position," as opposed to simply the duties performed by an employee, in determining whether an employee qualifies for LEO status. *Id.* at 1297. The Board has determined that that approach is "more faithful to the language of the statutes and the regulations." *Ibid.*

Petitioners claim (Pet. 13) that in *Watson* the Federal Circuit "recognized the infirmity of the *Bingaman/Hannon* analysis." To the contrary. The *Watson* court recognized that the Board's position-oriented approach is "wholly consistent with the approach taken by this court in *Bingaman*," and that those factors may still be

---

for providing early retirement to LEOs was not to reward them for hazardous duty, but rather to have them retire early because of the difficulty of performing hazardous duties as one ages. Daniels began his speech by stating that "the element of hazard was, and is, recognized." *Ibid.*

considered. 262 F.3d at 1301. In *Watson*, moreover, the MSPB itself emphasized that the Board's consideration of "the basic reasons for the existence of [a] position" would not preclude consideration "of what duties [an employee] performed from day-to-day in [that] position." 86 M.S.P.B. 318, 321 (2001). Rather, the Board will continue to consider evidence of an employee's duties, "along with all of the other evidence of record, to ascertain whether [an employee] is entitled to LEO retirement coverage." *Ibid.*

In these cases, the Board determined based on all the evidence that petitioners do not meet the statutory definition of an LEO. That determination does not warrant further review in this Court.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DAVID M. COHEN
JAMES M. KINSELLA
SCOTT D. AUSTIN
MICHAEL F. KIELY
Attorneys

NOVEMBER 2001

(3)

Supreme Court, U.S.
FILED
NOV 26 2001

No. 01-372

IN THE

Supreme Court of the United States

JAMES T. HANNON and RONALD J. TOWNSEND,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY

MICHAEL J. KATOR *
BRITA, DAGMAR, STRANDBERG,
KATOR, PARKS & WEISER
1020 19th Street, N.W.
Suite 350
Washington, D.C. 20036-6101
(202) 898-4800

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF AUTHORITIES

CASES — Page

Bingaman v. Department of the Treasury, 127 F. 3d 1431 (Fed. Cir. 1997) 2, 3, 4
Chevron, U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1987) 5
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 5
Hall v. Department of the Treasury, 264 F. 3d 1050 (Fed. Cir. 2001) 2, 3, 4
Hannon v. Department of Justice, 234 F. 3d 674 (Fed. Cir. 2000) 2, 4
Watson v. Department of the Navy, 262 F. 3d 1292 (Fed. Cir. 2001) 2, 3, 4

STATUTES

5 U.S.C. § 8331(20) 5
5 U.S.C. § 8401(17) 5

IN THE

Supreme Court of the United States

No. 01-372

JAMES T. HANNON and RONALD J. TOWNSEND,
Petitioners,

v.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY

Petitioners James T. Hannon and Ronald J. Townsend submit this reply to address decisions and matters that have arisen since the filing of their petition and briefly to address the government's opposition. The government suggests in its opposition that the task of reconciling the divergent precedents concerning the definition of a law enforcement officer should be left to the Federal Circuit. Yet only days after this petition was filed, the court below issued yet another inconsistent opinion on this issue. Far from providing concrete guidance and certainty, the court below has succeeded only in compounding the confusion. Review by this Court is thus all the more necessary.

ARGUMENT

1. In our petition we noted that the court below had issued three inconsistent decisions over the past four years struggling to apply Congress's straightforward definition of the

term "law enforcement officer." First, the court decided *Bingaman*,[1] in which it identified several extra-statutory factors that purportedly were germane to identifying those individuals performing law enforcement duties. Then, it decided *Hannon*,[2] in which it went out of its way to disavow genesis of the *Bingaman* factors, and added new factors, including one, hazard, that Congress repealed 25 years ago. Next, it issued *Watson*,[3] in which it recognized that the *Bingaman/Hannon* approach is not anchored in the statutory language and does not effectively distinguish between law enforcement officers and other employees. The *Watson* court thus spurned the individualized-inquiry approach used in *Bingaman* and *Hannon* in favor of a "position-oriented" approach. In so doing, it adopted five new criteria, but nonetheless concluded that the *Bingaman/Hannon* factors could be considered, "as necessary and appropriate."[4]

Since the filing of this petition, however, the court below has issued yet another inconsistent decision on this issue. In *Hall v. Department of the Treasury*,[5] decided only weeks after *Watson*, the court came full circle in its analysis. The Federal Circuit in *Hannon* was careful to distance itself from genesis of the *Bingaman* factors,[6] the *Watson* court recognized that the *Bingaman/Hannon* approach lacked statutory foundation and acknowledged that the *Bingaman* factors did not distinguish between law enforcement officer duties and other duties.[7] Yet in *Hall*, the court below concluded both that "the *Bingaman* considerations reflect . . . the language of

---

[1] *Bingaman v. Department of the Treasury*, 127 F. 3d 1431 (Fed. Cir. 1997).

[2] *Hannon v. Department of Justice*, 234 F. 3d 674 (Fed. Cir. 2000).

[3] *Watson v. Department of the Navy*, 262 F. 3d 1292 (Fed. Cir. 2001).

[4] *Id.* at 1302.

[5] *Hall v. Department of the Treasury*, 264 F. 3d 1050 (Fed. Cir. 2001).

[6] Pet. App. A at 7a.

[7] *Watson*, 262 F. 3d at 1302.

the statute" and that "the *Bingaman* considerations are relevant to determining whether an employee is a law enforcement officer."[8]

Thus, in the space of two-and-one-half weeks, the court below has gone from recognizing that the *Bingaman* factors do not distinguish between law enforcement duties and other duties and adopting a "position-oriented" approach that "is more faithful to the language of the statutes and regulations"[9] to whole-heartedly endorsing the *Bingaman* factors as an expression of the statutory language and espousing an individualized-inquiry approach to determining law enforcement officer coverage. The law is in such great flux now that neither agencies, employees or adjudicatory bodies can know what factors need be considered in determining law enforcement coverage nor what evidence is necessary to establish entitlement. Review by this Court is necessary to resolve these conflicts and to provide certainty to a process that continues to be plagued by uncertainty.

2. Also since the filing of our petition, the petitioners in *Watson* have sought certiorari.[10] Thus, this Court now has before it challenges to two diametrically inconsistent opinions from the same court. There can be no dispute that one of these decisions, at least, is wrong and similarly there is no question about the significance of the issue to federal agencies and employees as well as administrative and judicial tribunals charged with adjudicating these claims. The Court may wish to consider this case and *Watson* together or it may wish to hold one case and grant plenary review in the other. But what this Court should not do is allow the confusion and uncertainty engendered by these conflicting decisions to continue unabated.

3. In its opposition, the government principally argues that

---

[8] *Hall*, 264 F. 3d at 1056.

[9] *Watson*,262 F. 3d at 1297.

[10] Filed on November 15, 2001, the petition has not yet been docketed.

the decision below is correct. Certainly it would seem possible that one of the court's decisions, either *Bingaman*, *Hannon*, *Watson*, or *Hall*, is correct. But what is impossible is that they are all correct. Either the *Bingaman* factors "distinguish between law enforcement officer duties"[11] or they do not; either the proper inquiry (the one purportedly "more faithful to the language of the statutes and regulations"[12]) involves a "position-oriented"[13] approach or it does not. More fundamentally, either *Hannon*, which by necessary implication must be *less* faithful to the language of the statutes and regulations than *Watson*, is consistent with the statute or it is not. Regrettably, unless this Court grants plenary review, judges handling hundreds of pending cases will have to fend for themselves in the maze of uncertainty created by the court below and federal agencies and thousands of federal employees will have no clear guidance in resolving this recurring issue.

While the government argued that the decision below was correct, significantly, it did not suggest that it was unimportant. And, indeed, it is even more important today than it was when this petition was filed. Because of the recent attacks on our country, federal agencies are retasking their workforces to meet this evil. Many employees who traditionally are not granted law enforcement officer status, whether they be in the Immigration and Naturalization Service, the Customs Service, the Border Patrol, the Federal Aviation Administration, or in any number of other federal agencies, are finding that their duties are becoming "primarily the investigation, apprehension or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."[14] Congress has man-

[11] *Watson*, 262 F. 3d at 1302.

[12] *Id.* at 1297.

[13] *Id.* at 1300.

[14] 5 U.S.C. §§ 8331(20); 8401(17).

dated that these employees be treated as law enforcement officers. Absent review by this Court, whether they will, is at best a guess.

4. In its Brief in Opposition, the government contends that Petitioner Hannon's primary argument here—that the Federal Circuit strayed from the plain language of the statute—was not properly raised below. Op. Cert. at 7. Not so. The first argument made by Hannon in his brief in the court below was that courts are bound by the plain language of the statutes they construe.[15] The argument that the *Hannon* panel identified as not timely presented was whether that court should overturn *Bingaman*,[16] a feat the panel was powerless to accomplish. But this argument was timely raised in petitioner Hannon's and Townsend's joint Petition for Rehearing and Suggestion for Rehearing *En Banc*.

In any event, as the government acknowledges,[17] no similar argument can be made with respect to Petitioner Townsend. Thus, the issue presented in this petition was squarely before the court below and is properly presented here.

CONCLUSION

For the foregoing reasons, and for those reasons stated in

---

[15] *See e.g.*, Brief of Petitioner James T. Hannon at 18-21, *James T. Hannon v. Department of Justice*, No. 99-3354 (Fed. Cir. Nov. 19, 1999) (citing *Chevron, U.S.A.., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1987), and *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), among other authorities, for the proposition that courts are bound to give effect to the unambiguously expressed intent of Congress).

[16] Reply Brief of Petitioner James T. Hannon at 13 and n. 2, *James T. Hannon v. Department of Justice*, No. 99-3354 (Fed. Cir. Nov. 19, 1999) ("To the extent that [*Bingaman*] imposes additional requirements . . . beyond those stated by Congress, [it is] erroneous and should be overruled.").

[17] Op. Cert. at 9.

our petition, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

MICHAEL J. KATOR *
BRITA, DAGMAR, STRANDBERG,
KATOR, PARKS & WEISER
1020 19th Street, N.W.
Suite 350
Washington, D.C. 20036-6101
(202) 898-4800

* Counsel of Record

November 26, 2001